Supreme Court, U. S.
FILED
MAY 31 1974
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1973.

No. 73-1808

JAMES BURNETT McKAY LAING,
PETITIONER,

v.

UNITED STATES OF AMERICA ET AL.,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Supreme Court.

JOSEPH S. OTERI,
KEVIN M. KEATING,
RUDOLPH F. PIERCE,
MARTIN G. WEINBERG,
CRANE, INKER & OTERI,
20 Ashburton Place,
Boston, Massachusetts 02108,
Attorneys for the Petitioner.

ADDISON C. GETCHELL & SON, INC. · THE LAWYERS' PRINTER · BOSTON

Table of Contents.

Petition for writ of certiorari to the United States Supreme Court	1
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Reason for granting the writ	
Conclusion	13
Appendix A	15
Appendix B	19
Appendix C	29

Table of Authorities Cited.

Cases.

Clark v. Campbell, 341 F. Supp. 171 (N.D. Tex. 1972)	5n
Fuentes v. Shevin, 407 U.S. 67 (1972)	12
Goldberg v. Kelly, 397 U.S. 254 (1970)	12, 13
Hall v. United States, (6th Cir.) No. 73-1614	4
Irving v. Gray, 479 F. 2d 20 (2d Cir. 1973)	4, 5, 9, 10, 12
Laing v. United States, 364 F. Supp. 469 (D. Vt. 1973)	1, 10
Laing v. United States, F. 2d (2d Cir. 1974) No. 73-2537	12
Lisner v. McCanless, 356 F. Supp. 398 (D. Ariz. 1973)	5n

Phillips v. Commissioner of Internal Revenue,
283 U.S. 589 (1931) 11, 12

Rambo v. United States,
492 F. 2d 1060 (6th Cir. 1974) 4, 8, 10

Schreck v. United States,
301 F. Supp. 1265 (D. Md. 1969) 5n

Williamson v. United States,
31 A.F.T.R. 2d 800 (7th Cir. 1973) 5, 5n

Willits v. Richardson and O'Donnell,
32 A. F. T. R. 2d 73-5474 (S.D. Fla. 1973) 5n

STATUTES.

United States Constitution
Fifth Amendment 2, 12
Fourteenth Amendment 2

26 U.S.C.
§ 6851 2, 3, 4, 6, 9, 10, 12
§§ 6851-6864 6n
§ 6861 2, 4, 7, 8, 9

28 U.S.C. § 1254(1) 1

Internal Revenue Code of 1924
§ 274(d) 7
§ 279(a) 7
§ 279(b) 7

Internal Revenue Code of 1939
§ 146, 53 Stat. 63 6n

Internal Revenue Code of 1954 6, 11

Chapter 70, subchapter A 6, 8, 9, 11
§ 443(a)(3) 10
§ 6211(a) 10
§ 6212(a) 7
§ 6213(a) 7, 11
§ 6216(2) 8

Revenue Act of 1918, § 250(g) 6

Revenue Act of 1921, § 250(g), 42 Stat. 267 6n

Revenue Act of 1924, § 282, 43 Stat. 302 6n

Revenue Act of 1926 7, 8
§ 274(a) 7
§ 279(a) 7
§ 279(b) 8
§ 285, 44 Stat. 68 6n

Revenue Act of 1928, § 147, 45 Stat. 836 6n

Revenue Act of 1932, § 146, 47 Stat. 217 6n

Revenue Act of 1936, § 146, 49 Stat. 1703 6n

MISCELLANEOUS.

H. R. Rep. No. 179, 68th Cong. 1st Sess. 7 (1927) 7

Revenue Regulations, § 301.6211-1(a) 10

Supreme Court of the United States.

October Term, 1974.

No.

JAMES BURNETT McKAY LAING,
Petitioner,
v.
UNITED STATES OF AMERICA et al.,
Respondents.

Petition for Writ of Certiorari to the United States Supreme Court.

The petitioner, James Burnett McKay Laing, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 2, 1974.

Opinions Below.

The opinion of the Court of Appeals (App. A, *infra*) is not yet reported. The opinion of the District Court is reported at 364 F. Supp. 469 (1973) (App. B, *infra*).

Jurisdiction.

The judgment of the Court of Appeals was entered on May 2, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. Whether the Internal Revenue Service can employ 26 U.S.C. § 6851 to terminate a taxpayer's taxable year without following the procedure prescribed in 26 U.S.C. § 6861?

2. Whether the failure of the Internal Revenue Service to follow the procedure prescribed in 26 U.S.C. § 6851, if it is required to do so, is sufficient error to entitle the taxpayer to injunctive relief?

3. Whether the procedures followed by the Internal Revenue Service in performing its jeopardy assessment and seizure conformed to the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution?

Statutes Involved.

All pertinent statutes appear in Appendix C.

Statement.

On May 31, 1972, petitioner, a citizen of New Zealand, entered the United States from Canada on a B-2 visa. On June 24, 1972, petitioner and two companions attempted to enter Canada by way of Vermont but were refused entry into Canada by Canadian officials. Petitioner returned to the United States where he was stopped in an automobile by United States Customs officials in Derby, Vermont. The customs officials conducted a search and discovered a suitcase containing approximately $310,000 in the engine compartment of the automobile and petitioner and his companions were detained at the border.

Later that day, Fulton Fields, the District Director of the Internal Revenue Service for the District of Vermont was advised by custom officials of the above facts, and relying on them, found that the petitioner and those with him were in the process of putting their assets beyond the reach of the government by removing them from the country, thereby tending to prejudice or render ineffectual the collection of the tax alleged to be due. Agent Fields then terminated the 1972 taxable years of the three individuals pursuant to 26 U.S.C. § 6851. Agent Fields sent two internal revenue agents, Joseph O'Kane, Chief of the Intelligence Division for the District of Vermont, and James Perry, Asst. Chief of the Collection and Tax Service Division, Internal Revenue Service, Boston, Massachusetts, to the place of petitioner's detainment to take steps necessary to collect the tax liability of the petitioner and his companions.

The agents interviewed petitioner and his associates and demanded immediate payment of their tax liabilities in the amount of $310,000 for each individual. Petitioner and his associates refused to make payments of their alleged tax liability and the agents contacted the Internal Revenue Service Center in Andover, Massachusetts, and requested and received orally a tax assessment upon each person in the amount of $310,000. The agents orally communicated the assessments to the petitioner and his associates, and after a second refusal to make payment, the agents seized the money and applied it to the tax liabilities of the three individuals.

Subsequently, on June 29, 1972, Edward Gallagher, Acting Director of the Internal Revenue Service in Burlington, Vermont, sent petitioner a written declaration, made pursuant to 26 U.S.C. § 6851, informing petitioner that he was placing his assets beyond the reach of the government and,

thus, his taxable year of 1972 was terminated and a tax of $195,985.55 for the period from January 1, 1972, to June 24, 1972 was assessed and made payable.

On July 15, 1972, petitioner filed an equitable action seeking an injunction against the continued possession by the Internal Revenue Service of the seized money and seeking also a declaratory judgment that the provisions of the Internal Revenue Code under which the assessment and levy of his property were made were unconstitutional. On September 18, 1972, the respondents filed a motion to dismiss, or, in the alternative, for summary judgment. After hearings upon these matters, on September 12, 1973, the District Court entered an opinion and order which granted the government's motion. The District Court opinion was based substantially on the holding in *Irving* v. *Gray*, 479 F. 2d 20 (2d Cir. 1973), in which the United States Court of Appeals for the Second Circuit stated that § 6861 did not apply in the case of a jeopardy assessment made in respect to a departing or concealing taxpayer assessed under § 6851. Petitioner appealed and the court of appeals affirmed, adhering to its decision in *Gray, supra.*

Reason for Granting the Writ.

This case involves the construction of several sections of the Internal Revenue Code, particularly §§ 6851 and 6861, which establish the statutory procedure for jeopardy assessments and seizures. The interpretation of the statute employed in this case (26 U.S.C. § 6851) by the court below is in direct conflict with the recent decisions of the Court of Appeals for the Sixth Circuit in *Rambo* v. *United States*, 492 F. 2d 1060 (1974), and in *Hall* v. *United States*, No. 73-1614.

Consideration by this Court of the issues presented is necessary to clarify the procedures to be followed by the Internal Revenue Service in jeopardy assessment situations, to resolve the conflict between the Circuits, and to afford authoritative guidance in pending cases.[1]

The court below affirmed the dismissal of petitioner's complaint, relying on its decision in *Irving* v. *Gray*, 479 F. 2d 20 (2d Cir. 1973). In *Gray* the court adopted the position of the Seventh Circuit Court of Appeals in *Williamson* v. *United States*, 31 A.F.T.R. 2d 800 (1973), where it was stated:

> "... the deficiency notice requirement cannot be read into § 6851 because the assessment made under the section is not a deficiency as defined in § 6211. That section defines a deficiency as the amount by which the 'tax imposed' exceeds the amount shown on the tax return. The assessment in this case was not an imposed tax, but merely an amount which the I.R.S. believed justified the termination of the taxable year. Since no return had been filed at the date of the assessment, no deficiency was determinable." *Gray, supra*, 479 F. 2d at 24.

---

[1] The statutory construction issues presented in this petition were raised and decided against the Government in the following cases: *Schreck* v. *United States*, 301 F. Supp. 1265 (D. Md. 1969); *Clark* v. *Campbell*, 341 F. Supp. 171 (N.D. Tex. 1972), argued on December 4, 1973 (not yet decided), before the United States Court of Appeals for the Fifth Circuit, No. 73-2147; *Lisner* v. *McCanless*, 356 F. Supp. 398 (D. Ariz. 1973). The Government's position was sustained in the following cases: *Williamson* v. *United States*, 31 A.F.T.R. 2d 800 (7th Cir. 1973); *Willits* v. *Richardson and O'Donnell*, 32 A.F.T.R. 2d 73-5474 (S.D. Fla. 1973), argued on May 16, 1973 (not yet decided), before the United States Court of Appeals for the Fifth Circuit, No. 73-3163.

This holding fails to conform to the statutory requirements of the pertinent sections of the Internal Revenue Code of 1954.

1. The court's holding is predicated on two assumptions: (1) That in a jeopardy assessment situation the I.R.S. can find its assessment authority in a provision outside the jeopardy assessment scheme, subchapter A of Chapter 70;[2] and (2) That in a short year jeopardy assessment under § 6851, the matter assessed is not a "deficiency." Both the legislative history of the pertinent sections and their specific language evidence that these assumptions are erroneous.

Section 250(g) of the Revenue Act of 1918 provided the I.R.S. with the power to terminate the taxable year before its completion and to declare taxes for the short period immediately due and payable once the I.R.S. had found that there existed prejudicial activity by the taxpayer which threatened the future collectability of the taxes. This section, which has been repeatedly re-enacted in essentially identical language,[3] now stands as § 6851 of the Internal Revenue Code.

Under the 1918 Act, the short term taxpayer was in the same position as any other taxpayer against whom an assessment had been made—*i.e.*, he had to pay the tax first and then bring a refund suit later.

In succeeding revenue acts—first in 1924, then in 1926—Congress sought to mitigate the harshness of the

[2] 26 U.S.C. §§ 6851-6864, herein collectively cited as subchapter A of chapter 70.

[3] Section 250(g) of the Revenue Act of 1921, 42 Stat. 267, § 282 of the 1924 Act, 43 Stat. 302; § 285 of the 1926 Act, 44 Stat. 68; § 147 of the 1928 Act, 45 Stat. 836; § 146 of the 1932 Act, 47 Stat. 217; § 146 of the 1936 Act, 49 Stat. 1703; § 146 of the Internal Revenue Code of 1939, 53 Stat. 63; and § 6851 of the Internal Revenue Code of 1954, 68A Stat. 833.

pay first - litigate later rule. See H.R. Rep. No. 179, 68th Cong. 1st Sess. 7 (1927). In 1924, Congress established a non-prepayment forum, the Board of Tax Appeals. This forum, coupled with 279(b), which required the I.R.S. to send the normal, as distinguished from the jeopardy, deficient taxpayer a notice, provided some respite for the dissatisfied taxpayer in the non-jeopardy situation. The power of the I.R.S. was virtually unaffected, however, in those cases in which it believed the assessment or collection of a deficiency would be jeopardized by delay; for in the jeopardy assessment situation under § 274(d) no deficiency notice was required. The only way in which the jeopardy assessment taxpayer under this provision could get to the Board of Tax Appeals was by filing a claim of Abatement and posting a bond under §§ 279(a) and (b) of the 1924 Code. Thus, if the taxpayer could not post a bond, his only available relief again was to pay first and sue for a refund later.

The Revenue Act of 1926, however, made a fundamental change in the rights and remedies of jeopardy income taxpayers. Whereas previously they were barred from the Board of Tax Appeals unless they could post a bond, they were now given the right to a re-determination of the jeopardy assessment by the Board of Tax Appeals, although after the assessment was effectuated. The I.R.S. was thus required by § 279(a) of the 1926 Act to send a notice of deficiency to the jeopardy taxpayer within 60 days after making the assessment. This enabled the jeopardy taxpayer, under § 274(a), to petition for an adjudication by the Board of Tax Appeals within 60 days of the mailing of the deficiency notice. This procedure has been carried over to the present time with minor changes and is now set forth in §§ 6861, 6212(a) and 6213(a) of the 1954 Code.

Section 6861, like its predecessor § 279(b) of the Act of 1926, requires the I.R.S. to mail a deficiency notice to the taxpayer within 60 days of the date of the jeopardy assessment and the jeopardy taxpayer can now petition for a re-determination of the deficiency by the Tax Court, within a period of 90 days.

This development of the tax law clearly indicates an intent by Congress to mitigate the harshness of the pay first-litigate later rule by making available to all income taxpayers, both normal and jeopardy, the Tax Court as a non-prepayment forum.

> "It is inconceivable . . . that Congress could have intended to have given this minimal procedural protection to jeopardy taxpayers against whom a deficiency is assessed at the end of the taxable year but not to taxpayers whose year is terminated under Sec. 6851." *Rambo, supra*, 492 F. 2d at 1064.

By enacting the Revenue Act of 1926, Congress sought to mitigate the harshness of the pay first-litigate later rule by requiring the I.R.S. in jeopardy situations to adhere strictly to the procedures set forth in the jeopardy provisions. This intent was carried over to the Services' operation under the present Revenue Code; and requires, therefore, the Service both to follow the procedural safeguards of subchapter A of Chapter 70 of the 1954 Code and to find its assessment authority within these provisions as well.

This interpretation of the historical development of the Internal Revenue Code comports with the language of the pertinent provisions. Section 6216(2) of the 1954 Code provides:

> "For procedures relating to jeopardy assessment see subchapter A of Chapter 70."

This provision, consistent with the historical development described above, requires the I.R.S. to follow the procedures outlined in the jeopardy assessment provisions, subchapter A of Chapter 70. Only § 6861 of subchapter A of Chapter 70 contains assessment authority and it likewise requires the Service to send a deficiency notice to the jeopardy income taxpayer. It provides in pertinent part:

> "6861. [Jeopardy assessments of income, estate, and gift taxes.]
>
> "(a) Authority for Making—If the Secretary or his delegate believes that assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.
>
> "(b) Deficiency letters.—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment."

The court below held in *Gray, supra*, that the Service need not follow the deficiency notice requirement in the short-term jeopardy assessment situation under section 6851.

> "Since no return had been filed at the date of the assessment, no deficiency was determinable." *Gray, supra*, 479 F. 2d at 24.

By this statement, the court both misinterpreted the term "deficiency" and failed to recognize the existence of cer-

tain provisions of the Code and regulations promulgated by the Service.

Section 6211(a) of the 1954 Code defines deficiency as the amount by which the tax imposed exceeds the amount shown as the tax by the taxpayer on his return. Section 443(a)(3), which the court below failed to mention in its opinion in *Gray* and in *Laing*, requires a return to be filed by the taxpayer when the Secretary terminates the taxable year under § 6851. The taxpayer was not asked nor did he file such a return in this case. The absence of the return, however, does not mean, as the court below held, that "no deficiency was determinable." The plain, clear unequivocable language of the regulations promulgated by the Service indicates that if no return is filed, or if the return is filed but does not show any tax, "the deficiency is the amount of the tax imposed by subtitle A, chapter 11, or chapter 12" *Rambo, supra*, 492 F. 2d at 1064; see also, Revenue Regulations, § 301, 6211-1(a). In addition to the specific language of the code, § 6211(a) and the regulation promulgated to interpret it, the actions of the Service clearly indicate that a tax was imposed. On June 29, 1972, the Service sent petitioner a correspondence informing him that his taxable year, 1972, had been terminated and a tax of $195,985.55 for the period from January 1, 1972, to June 24, 1972, was assessed and made payable. *Laing, supra*, 364 F. Supp. at 471. At this point, petitioner was clearly a debtor of the United States Government. And by his earlier action at Derby, Vermont, where he both refused to acknowledge his tax liability and refused to pay his alleged liability, the petitioner was clearly denying his indebtedness to the United States. Under these circumstances, the tax imposed, $195,985.55, became the deficiency. Furthermore, § 6211(a) in no way limits the definition of a "deficiency" to the determination made only at the conclusion of the full taxable year.

In summary, both the legislative history and the specific language of the pertinent provisions of the 1954 Code clearly indicate that Congress intended for the Service to follow the procedures, both as to assessments and as to other procedural matters, outlined in subchapter A of Chapter 70.

2. There is no question regarding the right of the jeopardy taxpayer to enjoin the collection of the tax if the Service fails to adhere strictly to the notice requirement of subchapter A of Chapter 70, in making jeopardy assessments. This right is specifically granted by § 6213(a), which provides, in pertinent part:

> "Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B [§§ 1-1552, 2001-2524 of this title] . . . and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer. . . ."

This provision is further evidence of the strong Congressional intent requiring the Service to adhere strictly to the procedures outlined in the jeopardy assessment provisions.

3. If the Code were interpreted as the Service suggests, significant constitutional problems would arise. For, while it has been held that the summary assessment and collection procedure for collecting the internal revenue of the United States is constitutionally permissible, *Phillips* v. *Commissioner of Internal Revenue*, 283 U.S. 589, 51 S. Ct. 608 (1931), this procedure has been justified on the basis that the taxpayer has adequate post-seizure access to the courts. The procedures followed by the Service in this case and accepted by the court below, however, limit the taxpayer's access to a judicial forum for a refund suit which cannot be commenced until at least six months after

the taxpayer files his full term tax return. *Gray, supra,* 479 F. 2d at 24. *Laing* v. *United States,* F. 2d (2d Cir. 1974) No. 73-2537. The necessity for the taxpayer to endure this tremendous delay between summary assessment and the seizure under § 6851 and access to a judicial forum to contest the Service's action renders this procedure in violation of the Due Process clause of the United States Constitution.

To be sure, *Phillips* was recently cited with approval by this Court in *Fuentes* v. *Shevin,* 407 U.S. 67, 92, 92 S. Ct. 1983, 2000 (1972). *Phillips, supra,* was predicated, however, on the fact that the taxpayer was afforded an *adequate* opportunity to contest the Government's actions. This fact was reaffirmed in *Fuentes, supra.* Further, in *Fuentes, supra,* 407 U.S. at 90, 92 S. Ct. at 1999, the court balances the "postponement" of judicial access against the situation requiring it to determine if the need is "truly unusual." A similar balancing of interests was performed by this court in *Goldberg* v. *Kelly,* 397 U.S. 254, 262-263, 90 S. Ct. 1011, 1017-1018 (1970).

The procedure followed by the Service in this case and accepted by the court below totally ignores this balancing of interest; for, it restricts the taxpayer's judicial access to a refund suit and thereby prolongs his grievous loss for absolutely no compelling governmental interest. All other jeopardy income taxpayers are afforded a prompt opportunity for litigation in the Tax Court.

Moreover, during the period between assessment and seizure under § 6851, as employed by the Service in this case, and the taxpayer's access to a judicial forum, the Government's interests are completely secured while the taxpayer's interests are just as completely ignored. The *Phillips-Fuentes-Goldberg* trilogy recognizes normal due

process exceptions but finds justification in the postponement of judicial access for a *reasonable* length of time. Indeed, this court stated in *Goldberg, supra,* 397 U.S. at 266, 90 S. Ct. at 1019, that the drain on the governmental resources could be minimized by developing procedures for "prompt pre-termination hearings." In this case, the procedure followed by the Service violates due process—*i.e.,* if the Government's interpretation prevails—precisely because it is totally devoid of any notion of a "prompt" post-seizure hearing in a situation where no compelling governmental interest exists to justify the unnecessarily long delay.

Conclusion.

For the above discussed reasons, it is respectfully requested that the Court grant the petition for writ of certiorari.

Respectfully submitted,

JOSEPH S. OTERI,
KEVIN M. KEATING,
RUDOLPH F. PIERCE,
MARTIN G. WEINBERG,
CRANE, INKER & OTERI,
Attorneys for the Petitioner.

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

No. 707—September Term, 1973.

(Argued April 8, 1974 Decided May 2, 1974.)

Docket No. 73-2537.

JAMES BURNETT McKAY LAING,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA, JOHN M. WALTERS, Commissioner of Internal Revenue Service, FULTON D. FIELDS, District Director of Internal Revenue Service, District of Vermont, JAMES R. PERRY, Chief of Collection Division, District of Vermont,
Defendants-Appellees.

Before:

FRIENDLY AND TIMBERS, *Circuit Judges*, AND THOMSEN, *District Judge.**

Appeal from a judgment of the District Court for the District of Vermont, Albert W. Coffrin, *Judge*, dismissing plaintiff's complaint, which sought an injunction against the continued possession by the IRS of money allegedly

* Of the District of Maryland, sitting by designation.

belonging to him and a declaratory judgment that the provision of the IRC under which the assessment and levy on his property were made were unconstitutional.

Affirmed.

RUDOLPH F. PIERCE, Boston, Massachusetts (Joseph S. Oteri, Kevin M. Keating, Martin G. Weinberg, Crane, Inker & Oteri, Boston, Massachusetts, of counsel), *for Appellant.*

ROBERT S. WATKINS, Attorney, Department of Justice, Washington, D.C. (Scott P. Crampton, Assistant Attorney General, Meyer Rothwacks, Bennet N. Hollander, Attorneys, Department of Justice, Washington, D.C., and George W. Cook, United States Attorney for the District of Vermont, of counsel), *for Appellees.*

PER CURIAM:

Plaintiff appeals from the judgment of the district court dismissing plaintiff's complaint, which sought an injunction against the continued possession by the Internal Revenue Service of money allegedly belonging to him and a declaratory judgment that the provisions of the Internal Revenue Code under which the assessment and levy on his property were made were unconstitutional. The facts are set out in the opinion of the district judge, 364 F. Supp. 469, at 470, 471, and are not disputed.

On appeal plaintiff argues: (1) that the Government cannot assess a taxpayer's tax liability pursuant to 26 U.S.C. 6201 unless or until the taxpayer, or the Secretary

or his delegate on behalf of the taxpayer, files a tax return; (2) that the IRS cannot terminate a taxable year and make a jeopardy assessment under § 6851, but must proceed under § 6861; (3) that the assessment and seizure in the instant case constituted a denial of due process, and (4) that the district court was not without jurisdiction to grant relief. In effect, plaintiff is asking the Court to reconsider and overrule *Irving* v. *Gray*, 479 F.2d 20 (2 Cir. 1973).

We affirm the dismissal of the complaint. Notwithstanding the recent decision of the Sixth Circuit in *Rambo* v. *United States*, —— F.2d —— (February 12, 1974), we adhere to our decision in *Irving*, which discussed and declined to follow the decisions upon which *Rambo* was largely based, particularly *Schreck* v. *United States*, 301 F. Supp. 1265 (D. Md. 1969). See 479 F.2d at 23, 24. The facts and applicable principles in the instant case are essentially similar to those in *Irving*. Plaintiff was attempting to take some $300,000 in cash out of this country in a suitcase in the engine compartment of his automobile. A jeopardy assessment was clearly justified. So far as the record shows, no deficiency has yet been determined and plaintiff therefore has not yet had access to the Tax Court. But he has had the right, at any time, to file a return showing the amount of any tax due and to file an action in the appropriate district court six months thereafter to recover any claimed overpayment as a result of the jeopardy assessment and seizure of his money. Int. Rev. Code of 1954, §§ 7422 (a) and 6532 (a); T.R. 301.604-3 (b) (1958); *Irving* v. *Gray*, 479 F.2d at 24.

Actions to restrain the assessment or collection of federal taxes are generally barred by § 7421. This case does not fall within any of the exceptions enumerated in that section; nor does it fall within the exception created by

Enochs v. *Williams Packing Co.*, 370 U.S. 1 (1962), i.e., where (1) "it is clear that under no circumstances could the Government ultimately prevail" and (2) "equity jurisdiction otherwise exists". See *Irving* v. *Gray*, 479 F.2d at 25.

Affirmed.

Appendix B.

UNITED STATES DISTRICT COURT.
DISTRICT OF VERMONT.

Civil Action No. 6661.

September 12, 1973.

JAMES BURNETT McKAY LAING
v.
UNITED STATES OF AMERICA ET AL.

[364 F. Supp. 469]

Opinion and Order.

COFFRIN, District Judge.

On July 15, 1972 plaintiff filed an action seeking an injunction against the continued possession by the Internal Revenue Service (IRS) of money allegedly belonging to him and a declaratory judgment that the provisions of the Internal Revenue Code under which the assessment and levy on his property were made were unconstitutional. A flurry of motions to accelerate the course of this proceeding were filed shortly after the complaint and plaintiff attempted to depose various federal officials which the Government vigorously opposed. On September 18, 1972 the IRS filed a motion to dismiss or in the alternative for summary judgment. Hearings were held on the various motions on October 24, 1972 and July 31, 1973. Taking the facts in the light most favorable to the plaintiff and from

the affidavits filed by the Government which plaintiff concedes are accurate as far as they go, we find the following factual situation before us. On May 31, 1972 plaintiff, a citizen of New Zealand, entered the United States from Canada on a B-2 visa.[1] On June 24, 1972 plaintiff and two companions departed from the United States to Canada by way of Vermont but were refused entry into Canada by Canadian officials. As a result, plaintiff returned to the United States where he was stopped by U. S. Customs officials at Derby, Vermont. A suitcase containing approximately $310,000[2] was found in the engine compartment of the automobile and plaintiff, his companions and the money were detained at the border. On the same day, Fulton Fields, the District Director for IRS in Burlington, Vermont, was advised by customs officials of the above facts and, relying on them, found that plaintiff and those with him were in the process of putting their assets beyond the reach of the Government by removing them from the country thereby tending to prejudice or render ineffectual the collection of the tax. Upon making this finding, Fields terminated the 1972 taxable years of the three individuals and sent two IRS agents, Joseph O'Kane, Chief of the Intelligence Division, IRS, Burlington, Vermont, and James Perry, Assistant Chief of the Collection and Taxpayer Service Division, Internal Revenue Service, Boston, Massachusetts, to the border to take the steps necessary to collect the tax liabilities of these persons. Upon arriving at the border, the IRS agents interviewed plaintiff and his associates and demanded payment of tax from each in the amount of $310,000. Upon their refusal, the agents contacted the IRS Service Center in Andover, Massachusetts,

[1] 8 C.F.R. § 214.2(b) (1973).

[2] According to IRS affidavits, the actual amount seized was $306,896.50, but plaintiff claims he was in possession of $310,000.

and requested and orally received a tax assessment upon each person in the amount of $310,000. These assessments were communicated orally to the plaintiff by the IRS agents and after a second refusal, the sum of $306,896.50 was seized from the suitcase and applied to the tax liabilities of each person in the car.

On June 29, 1972, Edward Gallagher, Acting Director of IRS in Burlington, Vermont, sent plaintiff a written declaration made pursuant to 26 U.S.C. § 6851[3] that plaintiff was placing his assets beyond the reach of the Government and thus his taxable year 1972 was terminated and a tax of $195,985.55 for the period from January 1, 1972 to June 24, 1972 was assessed and made payable. This letter was sent to the address plaintiff gave U. S. Customs officials but it was returned to IRS "addressee unknown—no such street and number."

[3] 26 U.S.C. § 6851(a)(1) provides that:

(a) *Income tax in jeopardy.*—

(1) *In general.*—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

The plethora of theories relied upon by plaintiff can be reduced to three major contentions:

1). That the procedures employed by the IRS summarily deprived plaintiff of his property without a hearing in contravention of the Fifth Amendment to the United States Constitution;

2). The IRS's assessment of tax and levy of plaintiff's money was not in conformity with the applicable sections of the Internal Revenue Code and thus injunctive relief is warranted.

3). Assuming the IRS properly followed the Code, it acted arbitrarily and capriciously in seizing plaintiff's money.

Plaintiff's effort to obtain declaratory relief in this action must fail because the plain wording of the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, specifically excludes controversies concerning federal taxes. Thus, questions involving federal taxes may not be considered under the declaratory judgment section and the federal courts are without jurisdiction to enter declaratory judgments in such cases. United States v. Teitelbaum, 342 F.2d 672 (7th Cir. 1965), cert. denied, 382 U.S. 831, 86 S.Ct. 71, 15 L.Ed.2d 73 (1965); Standard Oil Co. (N.J.) v. McMahon, 139 F. Supp. 690 (S.D.N.Y.1956), aff'd, 244 F.2d 11 (2d Cir. 1956).

It is also settled beyond controversy that summary attachment for the collection of internal revenue is constitutionally permissible and does not run afoul of the procedural requirements of due process. Thus, no hearing was required before plaintiff's property was seized. Phillips v. Commissioner, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931); Parrish v. Daly, 350 F.Supp. 735 (S.D.Ind.1972). The holding in Phillips v. Commissioner, *supra*, was recently reaffirmed in Fuentes v. Shevin, 407 U.S. 67, 91-92, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

Plaintiff's constitutional and declaratory judgment contentions being fruitless, his case must rise or fall solely on the provisions of the Internal Revenue Code. In seeking to restrain the assessment or collection of a tax, plaintiff must come within one of the narrow exceptions to the anti-injunction provisions of 26 U.S.C. § 7421(a). Plaintiff contends that the exception to the broad anti-injunction provisions of Section 7421(a) contained in 26 U.S.C. § 6213(a) places restrictions on deficiency assessments and plaintiff argues that section 6213(a) prohibits immediate levies with no waiting period for the collection of tax except as provided in 26 U.S.C. § 6861.[4] Accordingly, plaintiff contends IRS was forced to proceed under section 6861 and, since the IRS never sent plaintiff a deficiency notice as provided in section 6861, the IRS did not follow the legislatively mandated procedures and thus injunctive relief can be had under section 7421(a).

The Government argues that since it proceeded under 26 U.S.C. § 6851 the procedures required in section 6861 are irrelevant, the section 6213(a) exception to the anti-injunction statute is inapposite and therefore plaintiff's action must be dismissed.

The threshold inquiry therefore becomes whether section 6851 or section 6861 is applicable to this controversy. Section 6851 provides for the termination of a taxable year and demand for an immediate payment of tax where jeopardy, i.e. prejudice against collection, is deemed present

---

[4] 26 U.S.C. § 6861(a) provides that:

(a) *Authority for Making.*—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

by IRS. In contrast, section 6861 provides for the jeopardy assessment of a deficiency in tax as defined by 26 U.S.C. § 6211(a). Generally, a deficiency is defined by section 6211(a) as the amount by which the tax imposed by statute exceeds the amount of tax shown on a taxpayer's return. By definition then, such a deficiency could not be determined until a return for a taxpayer's full taxable period has been filed or until the due date for filing such a return has expired. In this case, there was no return filed by the taxpayer and so there could be no deficiency. Since there was no deficiency there could be no deficiency assessment and consequently section 6861 cannot apply in this case.

Irving v. Gray, 479 F.2d 20 (2d Cir. 1973) holds that section 6861 and section 6213(a) do not apply in the case of a jeopardy assessment made in respect to a departing or concealing taxpayer assessed under section 6851.[5] *See also* Williamson v. United States, No. 17992 (7th Cir. filed April 8, 1971); Parrish v. Daly, *supra*.

Plaintiff contends that *Irving* is not binding precedent because in that case there was no attack on the procedure used by IRS nor was there any question of the arbitrariness of the IRS's determination that a jeopardy assessment should be made.

With regard to plaintiff's first proffered distinction, we note the similarity of the chronology of the IRS's action in this case and in *Irving*, both of which in our opinion satisfy the provision of 26 U.S.C. § 6331(a), the general levy and distraint provisions of the Code.[6] Since we have

[5] Section 6851 does not contain its own assessment authority but, contrary to plaintiff's contention, this section derives its assessment authority from 26 U.S.C. § 6201. Irving v. Gray, *supra*.

[6] Although *Irving* involved a written termination of the taxable year, notice of levy and assessment of tax, we do not believe the oral effectuation of these procedures is improper. Section 6851

previously determined that the summary assessment and levy procedure is not constitutionally impermissible, we reject plaintiff's argument that the procedures employed by the Government in this case were improper.[7]

We also reject plaintiff's challenge to the arbitrariness of the IRS's determination that there was jeopardy against the collection of these taxes which justified the termination of the taxable year. Plaintiff, relying upon Lucia v. United States, 474 F.2d 565 (5th Cir. 1973) and Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969), contends that the Government must have some basis in fact for the seizure and absent proof of this, no assessment can be made. *Lucia* and *Pizzarello* are patently distinguishable from this case because they do not involve jeopardy assessments under section 6851 but rather assessments under 26 U.S.C. § 6862(a) for unpaid wagering taxes.

The distinction is crucial because, unlike section 6862(a), section 6851(a) provides that the finding of the secretary or his delegate that jeopardy is present is presumptive evi-

does not, by its terms, require a writing and neither 26 U.S.C. § 6303 (notice and demand for tax) nor 26 U.S.C. § 6155 (payment on notice and demand) require a writing. Also, the levy and distraint provisions of section 6331 permit a levy to be made by giving notice in person. *See* United States v. Oliver, 421 F.2d 1034 (10th Cir. 1970) and United States v. Bernstein, 287 F.Supp. 84 (S.D. Fla. 1968) which hold that property levied upon and seized under section 6331 need not be accomplished by written notice, actual notice and demand are sufficient. Finally, we perceive that the nature of the jeopardy proceeding under section 6851 is not suited to the cumbersome requirements of written notice, *cf.* Irving v. Gray, *supra* ("Section 6851 was enacted to allow IRS to prevent taxpayers from fleeing the country with taxable funds. . . . Under such circumstances, Congress has given IRS a little leeway to protect the revenues.")

[7] We also note that even though the chronology in Williamson v. United States, *supra*, does not follow section 6331 the court refused to restrain the collection and assessment of the tax.

dence of jeopardy. Thus, where the IRS, in the interest of collecting revenue, proceeds by proper steps under section 6851, its determination of the facts and their sufficiency to warrant resort to peremptory collection are not to be reviewed in injunction proceedings. United States v. Bonaguro, 294 F.Supp. 750, 753 (E.D.N.Y.1968), aff'd sub nom. United States v. Dono, 428 F.2d 204 (2d Cir. 1970), cert. denied, 400 U.S. 829, 91 S.Ct. 57, 27 L.Ed.2d 59 (1970). *See also* Transport Mfg. and Equipment Co. of Del. v. Trainor, 382 F.2d 793 (8th Cir. 1967); Clark v. Campbell, 341 F.Supp. 171 (N.D.Tex. 1972). In this connection plaintiff does not attack the veracity of the affidavits filed by the Government describing the procedures employed in the assessment and levy but contends that they do not go far enough because they do not elucidate the factual basis for the Government's jeopardy determination under section 6851 which necessarily concludes that plaintiff was a person liable to pay tax. We disagree. This proceeding is not a proper vehicle for this challenge and we conclude that the affidavits are sufficiently explicit to enable the court to determine without doubt that the Government's procedures were proper and adequate. We determine that further exploration of the IRS's motivation for the assessment would not affect our decision concerning jurisdiction and is thus not relevant to any of the issues before the court in this particular proceeding. We therefore grant defendant's motion for a protective order barring the taking of depositions of the IRS officials noticed by plaintiff.

From what we have said, it is apparent that the judicially created doctrine announced in Enochs v. Williams Packing Co., 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962) is inapplicable because it is far from clear that "under no circumstances could the Government ultimately prevail" in this case.

In light of the foregoing we grant the Government's motion to dismiss but we do point out that this decision does not foreclose plaintiff's opportunity for redress in subsequent proceedings presented to the court in a proper jurisdiction and procedural posture.

Appendix C.

UNITED STATES CODE, TITLE 26.

§ 443. Returns for a period of less than 12 months

(a) *Returns for short period.*—A return for a period of less than 12 months (referred to in this section as "short period") shall be made under any of the following circumstances:

. . . . . .

(3) *Termination of taxable year for jeopardy.*—When the Secretary or his delegate terminates the taxpayer's taxable year under section 6851 (relating to tax in jeopardy).

. . . . . .

---

§ 6201. Assessment authority

(a) *Authority of Secretary or delegate.*—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) *Taxes shown on return.*—The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title.

(2) *Unpaid taxes payable by stamp.*—

(A) *Omitted stamps.*—Whenever any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale or use by the manufacturer thereof or whenever any transaction or act upon which a tax is required to be paid by means of a stamp occurs without the use of the proper stamp, it shall be the duty of the Secretary or his delegate, upon such information as he can obtain, to estimate the amount of tax which has been omitted to be paid and to make assessment therefor upon the person or persons the Secretary or his delegate determines to be liable for such tax.

(B) *Check or money order not duly paid.*—In any case in which a check or money order received under authority of section 6311 as payment for stamps is not duly paid, the unpaid amount may be immediately assessed as if it were a tax imposed by this title, due at the time of such receipt, from the person who tendered such check or money order.

(3) *Erroneous income tax prepayment credits.*—If on any return or claim for refund of income tax withheld at the source, or of the amount paid as estimated income tax, the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary or his delegate in the same manner as in the case of a mathematical error appearing upon the return.

(2) *Federal unemployment tax.*—No unpaid amount of Federal unemployment tax for any calendar quarter or other period of a calendar year, computed as provided in section 6157, shall be assessed.

(4) *Erroneous credit under section 39.*—If on any return or claim for refund of income taxes under subtitle A there is an overstatement of the credit allowable by section 39 (relating to certain uses of gasoline, special fuels, and lubricating oil), the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary or his delegate in the same manner as in the case of a mathematical error appearing upon the return.

(b) *Amount not to be assessed.*—

(1) *Estimated income tax.*—No unpaid amount of estimated tax under section 6153 or 6154 shall be assessed.

(2) *Federal unemployment tax.*—No unpaid amount of Federal unemployment tax for any calendar quarter or other period of a calendar year, computed as provided in section 6157, shall be assessed.

(c) *Compensation of child.*—Any income tax under chapter 1 assessed against a child, to the extent attributable to amounts includible in the gross income of the child, and not of the parent, solely by reason of section 73(a), shall, if not paid by the child, for all purposes be considered as having also been properly assessed against the parent.

(d) *Deficiency proceedings.*—

For special rules applicable to deficiencies of income, estate, gift, and chapter 42 taxes, see subchapter B.

---

§ 6211. Definition of a deficiency

(a) *In general.*—For purposes of this title in the case of income, estate, gift, and excise taxes, imposed by subtitles A and B, and chapter 42, the term "deficiency" means the amount by which the tax imposed by subtitle A or B or chapter 42 exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b) (2), made.

(1) The tax imposed by subtitle A and the tax shown on the return shall both be determined without regard to payments on account of estimated tax, without regard to the credit under section 31, and without regard to so much of the credit under section 32 as exceeds 2 percent of the interest on obligations described in section 1451.

(2) The term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by subtitle A or B or chapter 42 was less than the excess of the amount specified in subsection (a) (1) over the rebates previously made.

(3) The computation by the Secretary or his delegate, pursuant to section 6014, of the tax imposed by chapter 1 shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return.

(4) The tax imposed by subtitle A and the tax shown on the return shall both be determined without regard to the credit under section 39, unless, without regard to such credit, the tax imposed by subtitle A exceeds the excess of the amount specified in subsection (a) (1) over the amount specified in subsection (a) (2).

---

§ 6212. Notice of deficiency

(a) *In general.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 42, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

. . . . . .

(c) *Further deficiency letters restricted.*—

(1) *General rule.*—If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar quarter, of estate tax in respect of the taxable estate of the same decedent, of section 4940 tax for the same taxable year, or of chapter 42 tax (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b) (1) (relating to mathematical errors), or in section 6861(c) (relating to the making of jeopardy assessments).

(2) *Cross references.*

For assessment as a deficiency notwithstanding the prohibition of further deficiency letters, in the case of—

(A) Deficiency attributable to change of election with respect to the standard deduction where taxpayer and his spouse made separate returns, see section 144(b).

(B) Deficiency attributable to gain on involuntary conversion, see section 1033(a) (3) (C) and (D).

(C) Deficiency attributable to gain on sale or exchange of personal residence, see section 1034(j).

(D) Deficiency attributable to war loss recoveries where prior benefit rule is elected, see section 1335.

. . . . . .

---

§ 6213. Restrictions applicable to deficiencies; petition to Tax Court

(a) *Time for filing petition and restriction on assessment.*—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such

notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) Exceptions to restrictions on assessment.—

(1) *Mathematical errors.*—If the taxpayer is notified that, on account of a mathematical error appearing upon the return, an amount of tax in excess of that shown upon the return is due and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), or of section 6212(c) (1) (restricting further deficiency letters), or section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section.

. . . . . .

---

§ 6331. Levy and distraint

(a) *Authority of Secretary or delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful

for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) *Seizure and sale of property.*—The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

. . . . . .

---

§ 6332. Surrender of property subject to levy

(a) *Requirement.*—Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy

upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

. . . . . .

---

§ 6335. Sale of seized property

(a) *Notice of seizure.*—As soon as practicable after seizure of property, notice in writing shall be given by the Secretary or his delegate to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) *Notice of sale.*—The Secretary or his delegate shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be

sold, and the time, place, manner, and conditions of the sale thereof. Whenever levy is made without regard to the 10-day period provided in section 6331(a), public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

. . . . . .

---

§ 6511. Limitations on credit or refund

(a) *Period of limitation on filing claim.*—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

. . . . . .

---

§ 6851. Termination of taxable year

(a) *Income tax in jeopardy.*—

(1) *In general.*—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the

income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

. . . . . .

(b) *Reopening of taxable period.*—Notwithstanding the termination of the taxable period of the taxpayer by the Secretary or his delegate, as provided in subsection (a), the Secretary or his delegate may reopen such taxable period each time the taxpayer is found by the Secretary or his delegate to have received income, within the current taxable year, since a termination of the period under subsection (a). A taxable period so terminated by the Secretary or his delegate may be reopened by the taxpayer (other than a nonresident alien) if he files with the Secretary or his delegate a true and accurate return of the items of

gross income and of the deductions and credits allowed under this title for such taxable period, together with such other information as the Secretary or his delegate may by regulations prescribe. If the taxpayer is a nonresident alien the taxable period so terminated may be reopend by him if he files, or causes to be filed, with the Secretary or his delegate a true and accurate return of his total income derived from all sources within the United States, in the manner prescribed in this title.

. . . . . .

---

§ 6861. Jeopardy assessments of income, estate, and gift taxes

(a) *Authority for making.*—In the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

. . . . . .

(d) *Amount assessable after decision of Tax Court.*—If the jeopardy assessment is made after the decision of the Tax Court is rendered, such assessment may be made only in respect of the deficiency determined by the Tax Court in its decision.

(g) *Abatement if jeopardy does not exist.*—The Secretary or his delegate may abate the jeopardy assessment if he finds that jeopardy does not exist. Such abatement may not be made after a decision of the Tax Court in respect

of the deficiency has been rendered or, if no petition is filed with the Tax Court, after the expiration of the period for filing such petition. The period of limitation on the making of assessments and levy or a proceeding in court for collection, in respect of any deficiency, shall be determined as if the jeopardy assessment so abated had not been made, except that the running of such period shall in any event be suspended for the period from the date of such jeopardy assessment until the expiration of the 10th day after the day on which such jeopardy assessment is abated.

---

§ 6863. Stay of collection of jeopardy assessments

(a) *Bond to stay collection.*—When a jeopardy assessment has been made under section 6861 or 6862, the collection of the whole or any amount of such assessment may be stayed by filing with the Secretary or his delegate, within such time as may be fixed by regulations prescribed by the Secretary or his delegate, a bond in an amount equal to the amount as to which the stay is desired, conditioned upon the payment of the amount (together with interest thereon) the collection of which is stayed, at the time at which, but for the making of the jeopardy assessment, such amount would be due. Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If any portion of the jeopardy assessment is abated, the bond shall, at the request of the taxpayer, be proportionately reduced.

(b) *Further conditions in case of income, estate, or gift taxes.*—In the case of taxes subject to the jurisdiction of the Tax Court—

(1) *Prior to petition to Tax Court.*—If the bond is given before the taxpayer has filed his petition under section 6213(a), the bond shall contain a further condition that if a petition is not filed within the period provided in such section, then the amount, the collection of which is stayed by the bond, will be paid on notice and demand at any time after the expiration of such period, together with interest thereon from the date of the jeopardy notice and demand to the date of notice and demand under this paragraph.

(2) *Effect of Tax Court decision.*—The bond shall be conditioned upon the payment of so much of such assessment (collection of which is stayed by the bond) as is not abated by a decision of the Tax Court which has become final. If the Tax Court determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Tax Court is rendered the bond shall, at the request of the taxpayer, be proportionately reduced.

(3) *Stay of sale of seized property pending Tax Court decision.*—

(A) *General rule.*—Where notwithstanding the provisions of section 6213(a), a jeopardy assessment has been made under section 6861 the property seized for the collection of the tax shall not be sold—

(i) if section 6861(b) is applicable, prior to the issuance of the notice of deficiency and the expiration of the time provided in section 6213 (a) for filing petition with the Tax Court, and

(ii) if petition is filed with the Tax Court (whether before or after the making of such jeopardy assessment under section 6861), prior to the expiration of the period during which the assessment of the deficiency would be prohibited if section 6861(a) were not applicable.

(B) *Exceptions.*—Such property may be sold if—

(i) the taxpayer consents to the sale,

(ii) the Secretary or his delegate determines that the expenses of conservation and maintenance will greatly reduce the net proceeds, or

(iii) the property is of the type described in section 6336.

(C) *Applicability.*—Subparagraphs (A) and (B) shall be applicable only with respect to a jeopardy assessment made on or after January 1, 1955, and shall apply with respect to taxes imposed by this title and with respect to taxes imposed by the Internal Revenue Code of 1939.

---

§ 7422. Civil actions for refund

(a) *No suit prior to filing claim for refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

. . . . . .

CORRECTED COPY

Supreme Court, U. S.
FILED
NOV 29 1974
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 73-1808.

JAMES BURNETT McKAY LAING,
PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA ET AL.,
DEFENDANTS-APPELLEES.

Appendix.

ADDISON C. GETCHELL & SON, INC. · THE LAWYERS' PRINTER · BOSTON

Table of Contents.

'Appendix A 1

Relevant docket entries 2

Complaint 7

Motion for hearing on preliminary injunction 12

Notice of deposition 13

Notice of deposition 13

Motion for a protective order 14

Motion to dismiss or in the alternative for summary judgment 15

Affidavit of Fulton Fields 16

Affidavit of James Perry 17

Plaintiff's motion to amend complaint 19

Motion for return of property 20

Opposition to motion for return of property 20

Judgment on decision by the court 21

Notice of appeal 22

Order allowing certiorari 22

Exhibit A 23

Appendix B 25

Opinion and order of United States District Court, 364 F. Supp. 469 (D. Vt. 1973) 25

Appendix C 33

Per curiam opinion of United States Court of Appeals for the Second Circuit (496 F. 2d 1974) 33

Appendix D Judgment 35

Appendix E Relevant portions of transcript 37

Supreme Court of the United States.

October Term, 1974.

No. 73-1808.

JAMES BURNETT McKAY LAING,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA et al.,
Defendants-Appellees.

Appendix.

Appendix A.

UNITED STATES DISTRICT COURT.
DISTRICT OF VERMONT.

Civil No. 6661.

James Burnett McKay Laing
v.
United States of America et al.

Relevant Docket Entries.

	1972			
1	July	15	Filed Complaint. Issued Summons and delivered same to Marshal for service.
2		15	Filed Plaintiff's Motion for Hearing on Preliminary Injunction.
3		20	Filed Motion to issue Order to Show Cause; Motion to Advance Answer; and Certificate of Service.
4		24	Filed Summons; return served.
5		26	Filed Motion to Place Plaintiff's Property in Interest-Bearing Account; and Certificate of Service.
6	Aug.	3	Filed Defendants' Opposition to Motion to Advance Answer; Opposition to Place Plaintiff's Property in Interest-bearing Account; Response to Motion to Issue Order to Show Cause and Certificate of Service.
7		4	Filed Notice of Deposition of James Perry; and Certificate of Service.
8		21	Filed Defendants' Motion for a Protective Order, Memorandum in support of Motion for Protective Order and Certificate of Service.
9		21	Filed Plaintiff's Notice of taking Deposition of Fulton D. Fields.
10		25	Filed Plaintiff's Memorandum in opposition to Motion for a Protective Order and Certificate of Service.
11	Sept.	18	Filed Defendants' Motion to Dismiss or in the alternative for Summary Judgment and Certificate of Service.

12	Oct.	18	Filed Plaintiff's Motion for Hearing.
13		18	Filed Plaintiff's Memorandum in opposition to Motion to Dismiss.
14		19	Filed Affidavit of Fulton D. Fields.
15		19	Filed Affidavit of James Perry.
16		20	Filed Plaintiff's Motion to dismiss levy.
		24	In Court before Judge Coffrin. Duncan Kilmartin, Esq., and Martin Weinberg, Esq., for Plaintiff. Norman Cohen, Ass't. U. S. Attorney and John Mullenholz, Esq. for Government.
		24	Hearing on Motion to place Plaintiff's property in interest-bearing account.
		24	Statements made to Court by Mr. Weinberg, followed by Mr. Mullenholz who objects to Motion.
		24	Further statements made to Court by Mr. Weinberg.
		24	Decision reserved.
		24	Hearing on Defendants' Motion to Dismiss or in the alternative for Summary Judgment.
		24	Statements made to Court by Mr. Mullenholz in support of his Motion to Dismiss, objected to by Mr. Weinberg.
		24	Government to file a further memorandum in reply to Mr. Weinberg's memorandum.
		24	ORDERED: Government to submit supplemental memorandum by November 3, 1972, and Plaintiff has until November 10, 1972, to file reply memorandum.
		24	Hearing on Defendants' Motion for Protective Order.

		24	Statements made to Court by Mr. Mullenholz in support of his Motion followed by Mr. Weinberg.
		24	Court limits examination of witnesses to affidavits.
		24	The following witnesses, sworn by Clerk, were cross-examined by Mr. Weinberg: Fulton D. Fields and James R. Perry.
		24	ORDERED: Government to furnish Court to cite procedures in this situation, statute and theory of the case by November 3, 1972; Plaintiff to reply by November 10, 1972.
17		29	Filed Plaintiff's Motion to Amend Complaint.
18	Nov.	13	Filed Plaintiff's letter re Rule 15a.
19	Dec.	4	Filed Government's supplementary memorandum in support of motion to dismiss or in the alternative for summary judgment.
20		11	Filed Plaintiff's Supplementary memorandum in opposition to Motion to dismiss and motion for summary judgment and in support of preliminary injunction.
21		26	Filed Defendants' response to Plaintiff's supplementary memorandum.
	1973		
22	Jan.	22	Filed Plaintiff's motion for return of property.
23	Feb.	7	Filed defendants opposition to motion for return of property.
24	May	16	Filed supplementary memorandum of law in opposition to defendant's motion to dismiss or motion for summary judgment.

	Aug.	1	In open Court before Judge Coffrin; Duncan Kilmartin, Esq. and Martin Weinberg, Esq. for Plaintiff; John Hines, Esq. for Defendants.
		1	Upon consideration of Plaintiff's motion to amend Complaint, it is
		1	ORDERED: Motion granted.
		1	Continued hearing on defendants' motion to dismiss or in the alternative, for summary judgment; and hearing on plaintiff's motion for return of property.
		1	Statements made to Court by Mr. Hines, followed by Mr. Weinberg.
		1	All Motions taken under advisement.
25	Sept.	12	Filed Opinion and Order—Government's Motion to dismiss granted. The Court points out that this decision does not foreclose plaintiff's opportunity for redress in subsequent proceedings presented to the court in a proper jurisdictional and procedural posture. Mailed copy to Attorneys.
26		12	Filed Judgment on Decision by the Court—It is Ordered and Adjudged that Government's Motion to Dismiss granted. The Court points out that this decision does not foreclose plaintiff's opportunity for redress in subsequent proceedings presented to the Court in a proper jurisdictional and procedural posture. Mailed copy to Attys.
27		25	Filed Pltf's. Notice of Appeal. Mailed copy to Crane, Inker & Oteri, Esq., Duncan Kilmartin, Esq., U. S. Attorney and John P. Hines, Esq.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Case No. 73-2537.

James Burnett McKay Laing

v.

United States of America et al.

1973		
Sept.	26	Filed copies of docket entries and notice of appeal.
Oct.	16	Action Docketed.
Oct.	16	Received docket fee.
	19	Dep. acct. 100869 (4702) CD #60.
Nov.	5	Filed record (Original papers of district court).
	16	Filed designation of parts to be included in the appendix.
	16	Filed notice of appearance.
Dec.	17	Filed brief, appellant, with proof of service —by mail.
	17	Filed appendix, appellant, (Vol. I & II) with proof of service—by mail.
1974		
Jan.	2	Filed motion for leave to file a supplementary brief, appellant with proof of service.
	7	Filed order granting motion for leave to file a supplementary brief, appellant. The brief shall be served and filed not later than 1-21-74. Appellees shall answer not later than 2-15-74.
	22	Filed supplementary brief, appellant with proof of service—by mail.

Feb.	21	Filed brief, appellee, with proof of service—by mail.
	21	Filed notice of appearance.
Apr.	3	Filed motion for leave to hear argument of appeal en banc with proof of service.
	5	Filed order denying motion to hear argument of the appeal en banc.
	8	Argument heard: by Friendly, Timbers, CJJ & Thomsen, DJ.
	8	Filed 4 copies of U.S. Court of Appeals, 6th Circuit opinion.
May	2	Filed judgment.
	2	Judgment affirmed, Per Curiam.
	17	Filed itemized and verified bill of costs with proof of service—by mail.
June	10	Filed notice of filing of petition for writ of certiorari (SC #73-1808).
	26	Filed statement of costs.
	26	Issued mandate (opinion, judgment, and statement of costs).
Oct.	24	Filed certified copy of notice of granting of petition for a writ of certiorari and the case is set for oral argument in tandem with No. 74-75. (#73-1808)
Dec.	5	Certified original record and proceedings for Supreme Court Clerk.
1974		
Oct.	15	Order of Supreme Court allowing certiorari.

Complaint.

[Filed July 15, 1972.]

1. This is an action for injunctive relief and a declaratory judgment. The action seeks to restrain the enforce-

ment, operation, and execution of those levy powers of 26 USCA, § 6331(a) which are pursuant to a finding of jeopardy and to restrain the continued possession of plaintiff's property by the above-named defendants. A copy of 26 USCA, § 6331(a) is attached hereto and marked Exhibit "A." This action also seeks, in the alternative, a declaratory judgment that the jeopardy provision of 26 USCA, § 6331(a) is unconstitutional both on its face and as applied to the plaintiff in that it deprives plaintiff of his property without due process of law and in violation of the Fifth Amendment to the United States Constitution and it unconstitutionally restricts his right of travel. This action is brought under the Fifth Amendment of the United States Constitution and under 26 USCA, § 7421, 26 USCA, § 6213(a). 26 USCA, § 6861 and 26 USCA, § 6331(a). The matter in controversy exceeds $10,000 exclusive of costs and interests. Jurisdiction of the court is asserted under 28 USCA, § 1346(a)(1), 28 USCA, § 1331, 28 USCA, § 1332, 28 USCA, § 2201 and 2202, 28 USCA § 1361, and 28 USCA, § 1356.

2. Your plaintiff, James Burnett McKay Laing, is a citizen of New Zealand.

3. Your defendant, John M. Walters, is the Commissioner of the Internal Revenue Service.

4. Your defendant, Fulton D. Fields, is District Director of the Internal Revenue Service, District of Vermont.

5. Your defendant, James R. Perry, is Chief of the Collection Division, Internal Revenue Service, District of Vermont.

6. On or about May 31, 1972, the plaintiff entered the United States from Canada on a B-2 Visa.

7. On June 24, 1972, twenty-five days after entering the United States, the plaintiff departed the United States for Canada. His passengers were not permitted to enter Canada. The plaintiff did not enter Canada. He turned around

to return to the United States. The plaintiff's vehicle was stopped and searched by United States Customs upon reentering the United States. A suitcase with approximately $300,000 in United States currency was seized from him.

8. The plaintiff was informed that the money was being detained by the Internal Revenue Service.

9. No assessment was made *before* the property of plaintiff was levied upon.

10. No request was made for Mr. Laing to fill out a tax return *before* the property of plaintiff was levied upon.

11. No deficiency was determined *before* the property of plaintiff was levied upon.

12. No finding of jeopardy was made *before* the property of plaintiff was levied upon.

13. No notice or demand for the payment of a tax was served or communicated to plaintiff *before* the property of plaintiff was levied upon.

14. The procedural prerequisites of a levy and the procedural prerequisites of a finding of tax liability were not made before the property of Mr. Laing was levied upon.

15. The defendants have a statutory obligation to pursue the procedural prerequisites to a seizure of money and in the absence of such a conformity to the statute, the levy must be extinguished.

16. The plaintiff is a non-resident alien who was in the United States for less than one month.

17. The money is in no way connected with the conduct of any trade or business in the United States nor is it derived from any source within the United States; rather the money was brought into the United States for potential investments which did not materialize.

18. Inasmuch as the termination of taxable year provisions of 26 USCA, § 6851 were followed, there was still no provision for a levy until the formal and omitted procedures in numbers of 8 through 12 of this Complaint were followed.

19. Any levy occurring before the procedures are followed is in gross violation of the Fifth Amendment of the United States, and defendants, as United States Officers, have an obligation to return to Mr. Laing his possessions.

20. Regardless of the procedures, any levy upon the possessions of Mr. Laing is in violation of the Fifth Amendment of the United States Constitution unless some factual evidence is discovered by the Internal Revenue Service linking Mr. Laing's possessions with the standards for taxable income. In the absence of such evidence, they levy would deprive Mr. Laing of his property without due process. To the extent 26 USCA, § 1331(a) and 26 USCA, § 6861 permit a speculative determination of liability, they are unconstitutional. Furthermore, the provisions of 26 USCA, § 6331(a) are an unconstitutional interference with plaintiff's right to travel.

21. The plaintiff has been depossessed of approximately $300,000. He is being threatened with immediate, serious, irreparable, and clear harm due to this depossession. Plaintiff is faced with grave and imminent shortages of finances, with a costly interference with his business opportunities, with an immediate exhaustion of his resources upon which he depends to maintain a decent standard of living, with a frightening prospect of imminent problems in obtaining sufficient resources for necessities such as food and housing, and with a daily diminution of his property due to the impossibility of making investments while his assets are possessed by the Internal Revenue Service.

22. The Government cannot possibly succeed in maintaining the levy at any proceeding because:

(a) The Internal Revenue Service has levied upon plaintiff's property in violation of its own statutes, 26 USCA, § 6331(a), 26 USCA, § 6861(a), 26 USCA, § 6851, and in violation of the Fifth Amendment of the United States Constitution.

(b) The Internal Revenue Service has failed to make an assessment of deficiency as a prerequisite to the levy.

(c) The Internal Revenue Service has failed to take the proper formal steps to determine that plaintiff was a person "liable to pay any tax" under 26 USCA, § 6331(a).

(d) The Internal Revenue Service has failed to make a formal finding of jeopardy and has failed to give notice or demand for the payment of the tax, as prescribed by 26 USCA, § 6331(a).

(e) The Internal Revenue Service has failed to use any standards in its assessment of deficiency; in specific, upon the complete absence of any evidence linking the property of plaintiff with any tax liability, the seizure of the property and the levy upon it is a deprivation of property, without due process of law and as such is in violation of the Fifth Amendment of the United States Constitution. Thus, under the *Enochs v. Williams Packing and Navigation* case, 370 US 1, jurisdiction lies for unjunctive relief.

WHEREFORE, your petitioner prays that:

1. That a preliminary injunction be issued ordering that the defendants, their agents, and their successors be enjoined from continuing to possess any and all property of the plaintiff;

2. That a permanent injunction issue requiring defendants, their agents, and their successors to not seize the property of the plaintiff unless they following [*sic.*] the proper procedures which must precede any jeopardy levy under 26 USCA, § 6331(a), namely:

(a) An assessment;

(b) A determination of deficiency based on tax re-

turns, and on some evidence linking the plaintiff's property with taxable income;

(c) A formal finding of jeopardy;

(d) Notice and demand.

3. That the part of 26 USCA, § 6331(a) which permits a levy to be placed on property without explicitly requiring some finding based on evidence that tax liability does in fact exist be declared unconstitutional and in violation of the due process clause of the Fifth Amendment of the United States Constitution; and

4. All other relief as the Court may deem proper.

By his Attorneys,

CRANE, INKER & OTERI,
By JOSEPH S. OTERI,
By MARTIN G. WEINBERG.

Local Counsel: Duncan Kilmartin, Esq.
Rexford and Kilmartin
22 Third Street
Newport, Vermont 05855

Motion for Hearing on Preliminary Injunction.

[Filed July 15, 1972.]

Now comes the plaintiff and moves that a hearing be ordered by this Honorable Court, preferably during the week of July 24, 1972, and if not then as soon afterwards as is possible. The reason for the expedited hearing is that the plaintiff is suffering irreparable harm because of the unlawful seizure of his property.

By his Attorneys,

CRANE, INKER & OTERI,
By MARTIN G. WEINBERG.

Notice of Deposition.

[Filed August 4, 1972.]

To: James R. Perry
Assistant Chief
Collection and Taxpayer Service Division
Internal Revenue Service
P.O. Box 9087
J.F K. Post Office
Boston, Massachusetts 02203

Please take notice that pursuant to Rule 30(a) and Rule 30(b)(1) of the Federal Rules of Civil Procedure, the plaintiff in the above-entitled matter will take the deposition of James Perry before a notary public or other officer authorized by law to administer oaths commencing at 10:00 A.M. on Friday, August 25, 1972, at the offices of Crane, Inker & Oteri, Fourth Floor, 20 Ashburton Place, Boston, Massachusetts.

CRANE, INKER & OTERI,
By MARTIN G. WEINBERG,
Attorney for Plaintiff.

Notice of Deposition.

[Filed August 21, 1972.]

To: Fulton D. Fields
District Director of Internal
Revenue Service
Federal Building
Burlington, Vermont

Please take notice that pursuant to Rule 30(a) and Rule 30(b)(1) of the Federal Rules of Civil Procedure, the plaintiff in the above-entitled matter will take the deposition of

Fulton D. Fields before a notary public or other officer authorized by law to administer oaths commencing at 2:00 P.M. on Tuesday, August 29, 1972, at the offices of Crane, Inker & Oteri, Fourth Floor, 20 Ashburton Place, Boston, Massachusetts.

CRANE, INKER & OTERI,
By MARTIN G. WEINBERG,
Attorney for Plaintiff.

Motion for a Protective Order.

[Filed August 21, 1972.]

The defendants by their attorney, George W. F. Cook, Esq., United States Attorney for the District of Vermont, move this Court pursuant to Federal Rule of Civil Procedure 26(c) for a protective order directing that discovery not be had by the plaintiff in this action on the ground that this Court does not have jurisdiction to entertain this action as more fully set forth in the memorandum in support of this motion which is attached hereto and incorporated herein.

GEORGE W. F. COOK,
United States Attorney,
By NORMAN COHEN,
Assistant United States Attorney.

JOHN MULLENHOLZ,
Trial Attorney, Tax Division,
Department of Justice,
Washington, D.C. 20530.

Motion to Dismiss
or in the Alternative
for Summary Judgment.

[Filed September 18, 1972.]

The defendants, by their attorney, George W. F. Cook, United States Attorney for the District of Vermont move this Court pursuant to Rule 12 of the Federal Rules of Civil Procedure for an order dismissing this action on the following grounds:

1. This Court lacks authority to grant the relief requested because the provisions of 28 United States Code, Section 2201 forbid the granting of declaratory relief with respect to federal taxes.

2. Under the provisions of Section 7421(a) of Title 26 United States Code, this Court lacks jurisdiction to enjoin the collection of federal taxes.

3. This Court does not have jurisdiction over the defendants inasmuch as the suit is, in fact, one against the United States of America and as such is barred by sovereign immunity.

In the alternative the defendants move this Court for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law.

In support of this motion, there is a memorandum of law attached hereto.

GEORGE W. F. COOK,
United States Attorney,
By JOHN MULLENHOLZ,
Trial Attorney,
Tax Division
Washington, D. C.
202-739-3037

Affidavit of Fulton Fields.

[Filed October 19, 1972.]

FULTON FIELDS, being duly sworn, deposes and says:

1. That I am employed by the Internal Revenue Service of the United States as District Director of Internal Revenue for Burlington, Vermont, and that I was so employed on June 24, 1972.

2. That early on the morning of June 24, 1972, I was advised by an agent of the Bureau of Customs in Derby Line, Vermont, that James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed were detained at the United States border at Derby Line, Vermont, after being refused entry into Canada, in possession of United States coin and currency in excess of $300,000, the majority of which was found in the engine compartment of the automobile in which these three individuals were riding.

3. That upon receiving the information set forth in paragraph 2 of this affidavit. I found that James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed were in the process of placing their assets beyond the reach of the Government by concealing and removing the assets from the United States thereby tending to prejudice or render ineffectual collection of income tax and I determined that the taxable years of James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed should be terminated and that immediate efforts should be made to collect their tax liabilities.

4. That upon making the determination described in paragraph 3 of this affidavit, I contacted, by telephone, Joseph O'Kane, Chief of the Intelligence Division, Internal Revenue Service, Burlington, Vermont, and related the information set forth in paragraph 2 of this affidavit and requested that he, together with James Perry, who was at

that time Chief of the Collection and Taxpayer Service Division, Internal Revenue Service, Burlington, Vermont, proceed to Derby Line, Vermont, and take whatever steps necessary to collect the tax liabilities of James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed.

FULTON FIELDS,
District Director,
Internal Revenue Service,
Boston, Massachusetts.

Affidavit of James Perry.

[Filed October 19, 1972.]

JAMES PERRY, being duly sworn, deposes and says:

1. That I am Assistant Chief of the Collection and Taxpayer Service Division, Internal Revenue Service, of the Office of the District Director of Internal Revenue for Boston, Massachusetts.

2. That on June 24. 1972, I was Chief of the Collection and Taxpayer Service Division, Internal Revenue Service, of the Office of the District Director of Internal Revenue for Burlington, Vermont.

3. That on June 24, 1972, I was advised by Joseph O'Kane, Chief of the Intelligence Division, Internal Revenue Service, Burlington, Vermont, that James Burnett McKay Laing, Larry Robert Kleinhans, and Nancy Armistene Reed were detained at the United States border in Derby Line, Vermont, in possession of a large amount of United States currency and that Fulton Fields, District Director of Internal Revenue, Burlington, Vermont. had directed that all necessary steps be taken to collect the tax liabilities of those three individuals.

4. That upon receiving this information I proceeded with Joseph O'Kane to Derby Line, Vermont, where I interviewed James Burnett McKay Laing, Larry Robert Kleinhans, and Nancy Armistene Reed. The interview began at approximately 10:00 a.m. on Saturday, June 24, 1972.

5. That upon completing the interview described in paragraph 4 of this affidavit, I gave notice to James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed that in view of their attempt to place their assets beyond the reach of the Government by concealing and removing the assets from the United States thereby tending to prejudice or render ineffectual collection of income tax, their taxable years had been terminated and I demanded immediate payment of their tax liabilities in the amount of $310,000 for each individual.

6. That upon the refusal of James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed to make payment of their tax liabilities described in paragraph 5 of this affidavit, I contacted the Andover Service Center in Andover, Massachusetts, and requested that assessments be made against James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed in the amount of $310,000, as to each individual for the taxable period January 1, 1972, through June 24, 1972.

7. That after 12 noon on June 24, 1972, I was advised, telephonically, by a representative of the Andover Service Center in Andover, Massachusetts, that assessments had been made against each of the three individuals, James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed in the amount of $310,000 for the period January 1, 1972, through June 24, 1972.

8. That upon receiving the information described in paragraph 7 of this affidavit, I gave James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed

notice of the assessments and demanded payment of the assessments.

9. That James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed refused to make payment of the assessments described in paragraph 7 of this affidavit and upon their refusal to make payment of the assessments the sum of $306,896.50 was seized and applied to the tax liabilities of James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed.

JAMES PERRY,
Assistant Chief,
Collection and Taxpayer
Service Division.

Plaintiff's Motion to Amend Complaint.

[Filed October 29, 1972.]

Now comes the plaintiff in the above-captioned matter and moves that this Honorable Court permit him, under that part of Rule 15 of the Federal Rules of Civil Procedure which permits amendments as a matter of course prior to the service of responsive pleading, to amend his complaint by adding the following:

20(a) Plaintiff or his attorney have not received the required written notice within sixty (60) days of the assessment and levy as mandated by 26 USCA 6861(b), 26 USCA 6212(a); and in the absence of such notice the plaintiff is entitled to a return of his seized assets;

WHEREFORE:

2(a) A preliminary and permanent injunction issue against defendant due to its failure to send the required statutory notice within sixty (60) days of the making of the jeopardy assessment.

3(a) That the actions of the Internal Revenue Service which constituted a seizure and maintenance of plaintiff's money without any finding of a substantial or probable nexus between that money and taxable income should be enjoined as a violation of the Due Process Clause of the United States Constitution and the plaintiff's assets should be returned to him until such a probable nexus is established.

By his attorneys,
CRANE, INKER & OTERI,
By MARTIN G. WEINBERG.

Motion for Return of Property.

[Filed January 22, 1973.]

Now comes the plaintiff and moves that this Honorable Court order the defendants to return any and all monies seized from plaintiff which exceed the amount of his assessment.

CRANE, INKER & OTERI,
By MARTIN G. WEINBERG.

Opposition to Motion for Return of Property.

[Filed February 7, 1973.]

The defendants oppose the motion of the plaintiff for return of property on the grounds that this Court lacks jurisdiction over this action and, assuming *arguendo* that this Court had jurisdiction to return the property in question, the plaintiff has wholly failed to present any evidence to the Court in support of his contentions as contained in the complaint.

In support of this opposition, the defendants rely upon the several memoranda submitted in support of their motion to dismiss.

GEORGE W. F. COOK,
United States Attorney,
By JOHN MULLENHOLZ,
Trial Attorney, Tax Division,
Department of Justice,
Washington, D.C. 20530,
Telephone: 202-239-3037.

Judgment on Decision by the Court.

[Filed September 12, 1973.]

This action came on for trial (hearing) before the Court, Honorable Albert W. Coffrin, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged Government's Motion to Dismiss granted. The Court points out that this decision does not foreclose plaintiff's opportunity for redress in subsequent proceedings presented to the Court in a proper jurisdictional and procedural posture.

Notice of Appeal.

[Filed September 25, 1973.]

Notice is hereby given that James Burnett McKay Laing, plaintiff in the above-entitled action, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of Honorable Albert W. Coffrin granting Government's Motion to Dismiss entered in this action on the 12th day of September, 1973.

By his attorneys,

CRANE, INKER & OTERI,

By MARTIN G. WEINBERG.

SUPREME COURT OF THE UNITED STATES

No. 73-1808

JAMES BURNETT McKAY LAING,
PETITIONER,
v.
UNITED STATES ET AL.

ORDER ALLOWING CERTIORARI. Filed October 15, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is set for oral argument in tandem with No. 74-75.

Exhibit A.

DEPARTMENT OF THE TREASURY

INTERNAL REVENUE SERVICE

June 29, 1972 AU:R

James Burnett MacKay Laing
173 Cedar Wood Drive
Brattleboro, Vermont 05301

CERTIFIED MAIL

Dear Mr. Laing:

Pursuant to section 6851 of the Internal Revenue Code, you are notified that I have found you were in the process of placing your assets beyond the reach of the Government by concealing and removing the assets from the United States thereby tending to prejudice or render ineffectual collection of income tax for the period January 1, 1972 to June 24, 1972. Accordingly, I have declared the taxable period of January 1, 1972 to June 24, 1972 terminated; and, consequently, the income tax for the terminated period has become immediately due and payable.

Demand is hereby made for the tax for the terminated period in the following amount:

Taxable Period	*Tax*
1/1/72 to 6/24/72	$195,985.55

Any portion of the tax for the terminated period which is unpaid shall be assessed against you, and administrative or judicial action to collect the assessment shall be taken immediately.

Under section 443 of the Internal Revenue Code you are required to file a return for your terminated taxable period.

Such termination and filing does not relieve you of the responsibility for filing a return for your usual annual accounting period under section 6012 of the Code. Any amount collected as a result of termination of the period will be applied against any assessment which may be made for the terminated period and credited against the tax finally determined to be due on your annual return.

Very truly yours,
[Illegible.]
District Director
Acting

Appendix B.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JAMES BURNETT McKAY LAING
v.
UNITED STATES OF AMERICA ET AL.

Civ. A. No. 6661

[364 F. Supp. 469 (D. Vt. 1973)]

Opinion and Order

COFFRIN, District Judge.

On July 15, 1972 plaintiff filed an action seeking an injunction against the continued possession by the Internal Revenue Service (IRS) of money allegedly belonging to him and a declaratory judgment that the provisions of the Internal Revenue Code under which the assessment and levy on his property were made were unconstitutional. A flurry of motions to accelerate the course of this proceeding were filed shortly after the complaint and plaintiff attempted to depose various federal officials which the Government vigorously opposed. On September 18, 1972 the IRS filed a motion to dismiss or in the alternative for summary judgment. Hearings were held on the various motions on October 24, 1972 and July 31, 1973. Taking the facts in the light most favorable to the plaintiff and from the affidavits filed by the Government which plaintiff concedes are accurate as far as they go, we find the following factual situation before us. On May 31, 1972, plaintiff, a citizen of New Zealand, entered the United States from Canada on a B-2 visa.[1] On

[1] 8 C.F.R. § 214.2(b) (1973).

June 24, 1972 plaintiff and two companions departed from the United States to Canada by way of Vermont but were refused entry into Canada by Canadian officials. As a result, plaintiff returned to the United States where he was stopped by U. S. Customs officials at Derby, Vermont. A suitcase containing approximately $310,000[2] was found in the engine compartment of the automobile and plaintiff, his companions and the money were detained at the border. On the same day, Fulton Fields, the District Director for IRS in Burlington, Vermont, was advised by customs officials of the above facts and, relying on them, found that plaintiff and those with him were in the process of putting their assets beyond the reach of the Government by removing them from the country thereby tending to prejudice or render ineffectual the collection of the tax. Upon making this finding, Fields terminated the 1972 taxable years of the three individuals and sent two IRS agents, Joseph O'Kane, Chief of the Intelligence Division, IRS, Burlington, Vermont, and James Perry, Assistant Chief of the Collection and Taxpayer Service Division, Internal Revenue Service, Boston, Massachusetts, to the border to take the steps necessary to collect the tax liabilities of these persons. Upon arriving at the border, the IRS agents interviewed plaintiff and his associates and demanded payment of tax from each in the amount of $310,000. Upon their refusal, the agents contacted the IRS Service Center in Andover, Massachusetts, and requested and orally received a tax assessment upon each person in the amount of $310,000. These assessments were communicated orally to the plaintiff by the IRS agents and after a second refusal, the sum of $306,896.50 was seized from the suitcase and applied to the tax liabilities of each person in the car.

[2] According to IRS affidavits, the actual amount seized was $306,896.50, but plaintiff claims he was in possession of $310,000.

On June 29, 1972, Edward Gallagher, Acting Director of IRS in Burlington, Vermont, sent plaintiff a written declaration made pursuant to 26 U.S.C. § 6851[3] that plaintiff was placing his assets beyond the reach of the Government and thus his taxable year 1972 was terminated and a tax of $195,985.55 for the period from January 1, 1972 to June 24, 1972 was assessed and made payable. This letter was sent to the address plaintiff gave U.S. Customs officials but it was returned to IRS "addressee unknown—no such street and number."

The plethora of theories relied upon by plaintiff can be reduced to three major contentions:

1). That the procedures employed by the IRS summarily deprived plaintiff of his property without a hearing in contravention of the Fifth Amendment to the United States Constitution;

[3] 26 U.S.C. § 6851(a)(1) provides that:

(a) *Income tax in jeopardy.*—

(1) *In general.*—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

2). The IRS's assessment of tax and levy of plaintiff's money was not in conformity with the applicable sections of the Internal Revenue Code and thus injunctive relief is warranted.

3). Assuming the IRS properly followed the Code, it acted arbitrarily and capriciously in seizing plaintiff's money.

Plaintiff's effort to obtain declaratory relief in this action must fail because the plain wording of the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, specifically excludes controversies concerning federal taxes. Thus, questions involving federal taxes may not be considered under the declaratory judgment section and the federal courts are without jurisdiction to enter declaratory judgments in such cases. United States v. Teitelbaum, 342 F.2d 672 (7th Cir. 1965), cert. denied, 382 U.S. 831, 86 S. Ct. 71, 15 L.Ed.2d 75 (1965); Standard Oil Co. (N.J.) v. McMahon, 139 F.Supp. 690 (S.D. N.Y.1956), aff'd, 244 F.2d 11 (2d Cir. 1956).

It is also settled beyond controversy that summary attachment for the collection of internal revenue is constitutionally permissible and does not run afoul of the procedural requirements of due process. Thus, no hearing was required before plaintiff's property was seized. Phillips v. Commissioner, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931); Parrish v. Daly, 350 F.Supp. 735 (S.D.Ind.1972). The holding in Phillips v. Commissioner, *supra*, was recently reaffirmed in Fuentes v. Shevin, 407 U.S. 67, 91-92, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

Plaintiff's constitutional and declaratory judgment contentions being fruitless, his case must rise or fall solely on the provisions of the Internal Revenue Code. In seeking to restrain the assessment or collection of a tax, plaintiff must come within one of the narrow exceptions to the anti-injunction provisions of 26 U.S.C. § 7421(a). Plaintiff contends that the exception to the broad anti-injunction provisions of Section 7421(a) contained in 26 U.S.C. § 6213(a) places restrictions on deficiency assessments and plaintiff argues that section 6213(a) prohibits immediate levies with no waiting period for the collection of tax except as provided in 26 U.S.C. § 6861.[4] Accordingly, plaintiff contends IRS was forced to proceed under section 6861 and, since the IRS never sent plaintiff a deficiency notice as provided in section 6861, the IRS did not follow the legislatively mandated procedures and thus injunctive relief can be had under section 7421(a).

The Government argues that since it proceeded under 26 U.S.C. § 6851 the procedures required in section 6861 are irrelevant, the section 6213(a) exception to the anti-injunction statute is inapposite and therefore plaintiff's action must be dismissed.

The threshold inquiry therefore becomes whether section 6851 or section 6861 is applicable to this controversy. Section 6851 provides for the termination of a taxable year and demand for an immediate payment of tax where jeopardy, i. e. prejudice against collection. is deemed present by IRS. In contrast, section 6861 provides for the jeopardy assessment of a deficiency in tax as defined by 26 U.S.C. § 6211(a). Generally, a deficiency is defined by section 6211(a) as the amount by which the tax imposed by statute exceeds the amount of tax shown on a taxpayer's return. By definition then, such a deficiency could not be determined until a return

---

[4] 26 U.S.C. § 6861(a) provides that:

(a) *Authority for Making.*—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

for a taxpayer's full taxable period has been filed or until the due date for filing such a return has expired. In this case, there was no return filed by the taxpayer and so there could be no deficiency. Since there was no deficiency there could be no deficiency assessment and consequently section 6861 cannot apply in this case.

Irving v. Gray, 479 F.2d 20 (2nd Cir. 1973) holds that section 6861 and section 6213(a) do not apply in the case of a jeopardy assessment made in respect to a departing or concealing taxpayer assessed under section 6851.[5] *See also* Williamson v. United States, No. 17992 (7th Cir. filed April 8, 1971); Parrish v. Daly, *supra*.

Plaintiff contends that *Irving* is not binding precedent because in that case there was no attack on the procedure used by IRS nor was there any question of the arbitrariness of the IRS's determination that a jeopardy assessment should be made.

With regard to plaintiff's first profferred distinction, we note the similarity of the chronology of the IRS's action in this case and in *Irving*, both of which in our opinion satisfy the provision of 26 U.S.C. § 6331(a), the general levy and distraint provisions of the Code.[6] Since we have previously determined that the summary assessment and levy procedure is not constitutionally impermissible, we reject plaintiff's argument that the procedures employed by the Government in this case were improper.[7]

[5] Section 6851 does not contain its own assessment authority but, contrary to plaintiff's contention, this section derives its assessment authority from 26 U.S.C. § 6201. Irving v. Gray, *supra*.

[6] Although *Irving* involved a written termination of the taxable year, notice of levy and assessment of tax, we do not believe the oral effectuation of these procedures is improper. Section 6851 does not, by its terms, require a writing and neither 26 U.S.C. § 6303 (notice and demand for tax) nor 26 U.S.C. § 6155 (payment on notice and demand) require a writing. Also, the levy and distraint provisions of section 6331 permit a levy to be made by giving notice in person. *See* United States v. Oliver, 421 F.2d 1034 (10th Cir. 1970) and United States v. Bernstein, 287 F.Supp. 84 (S.D.Fla.1968) which hold that property levied upon and seized under section 6331 need not be accomplished by written notice, actual notice and demand are sufficient. Finally, we perceive that the nature of the jeopardy proceeding under section 6851 is not suited to the cumbersome requirements of written notice, *cf.* Irving v. Gray, *supra* ("Section 6851 was enacted to allow IRS to prevent taxpayers from fleeing the country with taxable funds. . . . Under such circumstances, Congress has given IRS a little leeway to protect the revenues.")

[7] We also note that even though the chronology in Williamson v. United States, *supra*, does not follow section 6331 the court refused to restrain the collection and assessment of the tax.

We also reject plaintiff's challenge to the arbitrariness of the IRS's determination that there was jeopardy against the collection of these taxes which justified the termination of the taxable year. Plaintiff, relying upon Lucia v. United States, 474 F.2d 565 (5th Cir. 1973) and Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969), contends that the Government must have some basis in fact for the seizure and absent proof of this, no assessment can be made. *Lucia* and *Pizzarello* are patently distinguishable from this case because they do not involve jeopardy assessments under section 6851 but rather assessments under 26 U.S.C. § 6862(a) for unpaid wagering taxes.

The distinction is crucial because, unlike section 6862(a), section 6851(a) provides that the finding of the secretary or his delegate that jeopardy is present is presumptive evidence of jeopardy. Thus, where the IRS, in the interest of collecting revenue, proceeds by proper steps under section 6851, its determination of the facts and their sufficiency to warrant resort to peremptory collection are not to be reviewed in injunction proceedings. United States v. Bonaguro, 294 F.Supp. 750, 753 (E.D.N.Y.1968), aff'd sub

nom. United States v. Dono, 428 F.2d 204 (2d Cir. 1970), cert. denied, 400 U.S. 829, 91 S.Ct. 57, 27 L.Ed.2d 59 (1970). *See also* Transport Mfg. and Equipment Co. of Del. v. Trainor, 382 F.2d 793 (8th Cir. 1967); Clark v. Campbell, 341 F.Supp. 171 (N.D.Tex,1972). In this connection plaintiff does not attack the veracity of the affidavits filed by the Government describing the procedures employed in the assessment and levy but contends that they do not go far enough because they do not elucidate the factual basis for the Government's jeopardy determination under section 6851 which necessarily concludes that plaintiff was a person liable to pay tax. We disagree. This proceeding is not a proper vehicle for this challenge and we conclude that the affidavits are sufficiently explicit to enable the court to determine without doubt that the Government's procedures were proper and adequate. We determine that further exploration of the IRS's motivation for the assessment would not affect our decision concerning jurisdiction and is thus not relevant to any of the issues before the court in this particular proceeding. We therefore grant defendant's motion for a protective order barring the taking of depositions of the IRS officials noticed by plaintiff.

From what we have said, it is apparent that the judicially created doctrine announced in Enochs v. Williams Packing Co., 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962) is inapplicable because it is far from clear that "under no circumstances could the Government ultimately prevail" in this case.

In light of the foregoing we grant the Government's motion to dismiss but we do point out that this decision does not foreclose plaintiff's opportunity for redress in subsequent proceedings presented to the court in a proper jurisdictional and procedural posture.

Appendix C.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES BURNETT McKAY LAING

v.

UNITED STATES OF AMERICA ET AL.

N. 707, Docket 73-2537

[496 F.2d 853 (2d Cir. 1974)]

PER CURIAM:

Plaintiff appeals from the judgment of the district court dismissing plaintiff's complaint, which sought an injunction against the continued possession by the Internal Revenue Service of money allegedly belonging to him and a declaratory judgment that the provisions of the Internal Revenue Code under which the assessment and levy on his property were made were unconstitutional. The facts are set out in the opinion of the district judge, 364 F.Supp. 469, at 470, 471, and are not disputed.

On appeal plaintiff argues: (1) that the Government cannot assess a taxpayer's tax liability pursuant to 26 U.S.C. § 6201 unless or until the taxpayer, or the the Secretary or his delegate on bahalf of the taxpayer, files a tax return; (2) that the IRS cannot terminate a taxable year and make a jeopardy assessment under § 6851, but must proceed under § 6861; (3) that the assessment and seizure in the instant case constituted a denial of due process, and (4) that the district court was not without jurisdiction to grant relief. In effect, plaintiff is asking the Court to reconsider and overrule Irving v. Gray. 479 F.2d 20 (2 Cir. 1973).

We affirm the dismissal of the complaint. Notwithstanding the recent decision of the Sixth Circuit in Rambo v. United States, 492 F.2d 1060 (1974), we adhere to our decision in *Irving*, which discussed and declined to follow the decisions upon which *Rambo* was largely based, particularly Schreck v. United States, 301 F.Supp. 1265 (D.Md.1969). See 479 F.2d at 23, 24. The facts and applicable principles in the instant case are essentially similar to those in *Irving*. Plaintiff was attempting to take some $300,000 in cash out of this country in a suitcase in the engine compartment of his automobile. A jeopardy assessment was clearly justified. So far as the record shows, no deficiency has yet been determined and plaintiff therefore has not yet had access to the Tax Court. But he has had the right, at any time, to file a return showing the amount of any tax due and to file an action in the appropriate district court six months thereafter to recover any claimed overpayment as a result of the jeopardy assessment and seizure of his money. Int.Rev. Code of 1954, §§ 7422(a) and 6532(a); T.R. § 301.604-3(b) (1958); Irving v. Gray, 479 F.2d at 24.

Actions to restrain the assessment or collection of federal taxes are generally barred by § 7421. This case does not fall within any of the exceptions enumerated in that section; nor does it fall within the exception created by Enochs v. Williams Packing Co., 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962), i. e., where (1) "it is clear that under no circumstances could the Government ultimately prevail" and (2) "equity jurisdiction otherwise exists". See Irving v. Gray, 479 F.2d at 25.

Affirmed.

Appendix D.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of May one thousand nine hundred and seventy-four.

Present: HON. HENRY J. FRIENDLY
HON. WILLIAM H. TIMBERS
Circuit Judges
HON. ROSZEL C. THOMSEN
District Judge

JAMES BURNETT McKAY LAING
v. 73-2537
UNITED STATES OF AMERICA ET AL.

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk,
By VINCENT A. CARLIN,
Chief Deputy Clerk.

Appendix E.

[36] MR. WEINBERG: Mr. Fields.

FULTON D. FIELDS, having been called as a witness, was duly sworn by the Clerk and testified on his oath, as follows:

CROSS EXAMINATION BY MR. WEINBERG:

Q. Mr. Fields, tell the Court your name and address? A. Fulton D. Fields, Burlington, Vermont.

Q. You are presently employed as the District Director of the Internal Revenue for the State of Vermont? A. Yes.

Q. And you were so employed on June 24, 1972? A. Yes.

Q. You made an affidavit out which I now show you, is that correct? A. (No response).

Q. I am going to ask you some questions from the affidavit. A. Good.

Q. Do you have a copy of it? A. Yes, I do.

Q. In paragraph 2, you said that you received certain information [37] by an agent of the Bureau of Customs in Derby Line, Vermont, who is that agent? A. An agent by the name of CURTIS.

Q. Mr. CURTIS?, A. Yes.

Q. And where were you when you received this information? A. At home.

Q. Was this a phone conversation. A. Yes.

Q. And, could you tell us the substance of that conversation? A. Yes, he called me early one morning, Saturday morning, and he told me that they had turned back to them three individuals who had tried to enter Canada during the night and when they came back into Customs, they located a sum of money and I asked him how long they could hold them, if there was money involved, and was their tax paid

on it, and he said they could hold them for two hours or if you would send someone up here, we will hold them until they arrive.

Q. And would you determine they were placing their assets beyond read [*sic*] of the Government by concealing or removing the assets from the United States, that was the sole information upon which you relied? A. Give me that again, please?

[38] Q. You have no personal knowledge of whether or not Mr. LAING and other people in his car were planning on taking the assets of this country, out of the country, did you? A. I had no knowledge prior to that conversation.

Q. You were back in Vermont, right? A. right.

Q. And the only knowledge you had before making the determinations alleged in the paragraph 3 of your Affidavit, were those,—that information coming to you from a phone call by Larry CURTIS? A. Right, they had tried to enter Canada, and were returned by the Canadian Government and they found the cash at that time and particularly, since it was in the hood or under the hood of the car.

Q. Did Mr. CURTIS tell you whether or not these were citizens of America, or aliens? A. I don't believe that he did. I don't know,—I don't remember, at this point.

Q. Did you ask him any questions about whether or not these were businessmen, or whether or not, or what these people looked like, or who these people were? A. No.

MR. MULLENHOLZ: Your Honor, I object to these questions, I think they are outside of the scope of the affidavit.

[39] MR. WEINBERG: Your Honor, the jurisdictional question here is whether there's any basis for the finding of jeopardy, I think I have a right on the jurisdictional question to go into what made Mr. Fields decide that the money was in jeopardy.

MR. MULLENHOLZ: Your Honor, I argue strenuously against that. There is no opportunity here for the Court, or for the, I'm sorry, for the plaintiff to challenge his determination as to whether or not there was a jeopardy situation. The question is, did he determine that there was a jeopardy situation, not the basis for his determination.

THE COURT: Yes, the Court agrees and the Court believes that at this stage, the question should be confined as to whether or not, having made the determination, the Government acted procedurally in a correct manner.

MR. WEINBERG: So, if I can speak to that, I cannot go into the reasons behind the determination, the determination is just being taken as a fact, Your Honor?

THE COURT: You can go into the facts only as alleged in the affidavit. And, whether or not the Government acted, or how the Government acted, but not the reasons for the act, as long as it was . . . (Interrupted).

MR. WEINBERG: Did,—did Mr. CURTIS tell you why they weren't admitted in to Canada? [40] A. No.

Q. So, on the basis of that phone conversation, which took how long? A. I would say maybe ten minutes.

Q. You found that these people were in the process of placing thier assets beyond the reach of the Government, is that correct? A. In my opinion.

Q. Was this a mental finding? A. What other way would I have? They tried to enter Canada with this much money.

Q. Did you write it down? A. What do you mean?

Q. When you made this finding, did you make any administrative steps to implement it in terms of writing? A. Well, I . . . (Simultaneous voices)

Q. I—

MR. MULLENHOLZ: Object, Your Honor, I think that the only question is whether or not he made that finding, he has so stated what he did with the information as

set forth in the affidavit. I mean, the fact that he made the determination, and I don't think it is that question of whether he wrote it down or put it on a pad, or what he did,—he made the determination, and that is all the staute requires.

[41] THE COURT: Well, how do you consider it relevant as to whether it was a written determination, or a determination which he made in a discretionary capacity?

MR. WEINBERG: One of my contentions is that improper procedures were followed and I speak to raise the issue with Your Honor, and I think the issue is unclear from the regulations, and from the statutes as to what mechanism,—what is this finding? Is this just a mental finding by the District Director, or is this just some sort of a standard, or after making the finding, is there some consequences to the findings the District Director must pursue, to make the findings legitimately? He can keep it in his head forever and doesn't have to do anything with it, or does he have to put it down on any sort of reports?

THE COURT: No, I think this was an immediate determination, which he was obliged to make and did make, and what he may have done after that, I think might be proper, but at that particular time, in strict fidulity(?), to think that he would make any written finding of any . . . (interrupted) . . . permanent nature . . . (Simultaneous voices).

MR. WEINBERG: Once having made the finding, . . . when you made the finding, were you still on the phone with Mr. CURTIS? A. I don't know just what you mean by "When you made the [42] "finding," I made a determination.

Q. Yes, when you determined that this money was in jeopardy, that is the finding you made, correct? A. When I determined that they were trying to remove this money from the United States, that is when I made the decision.

Q. When was that? A. Immediately.

Q. On the phone? A. On the phone.

Q. Did you communicate the finding to anyone? A. Yes.

Q. Who,—to who? A. To our Chief of Intelligence.

Q. Who is that? A. Joseph O'Kane.

Q. So, you made a subsequent phone call to Mr. O'Kane? A. Right.

Q. Where was he at the time? A. He was at his home.

Q. And what did you tell him, in substance, if you recall? A. I tried to repeat the information received from Agent CURTIS and told him that I wanted us to cover that money, if,—legitimately to set up the assessment, but [43] that he is our Intelligence Chief and since Mr. PERRY lived very close to him at that time, to contact him and proceed to Derby Line where this had taken place and to take whatever steps were necessary.

Q. And, what steps did you consider necessary to make a proper conclusion to this matter, once you had made a finding there was jeopardy?

MR. MULLENHOLZ: Your Honor. I think he stated that he told the Chief of Intelligence to tell Mr. PERRY to take whatever steps were necessary to . . .

THE COURT: May I have that question again? (Question read by reporter)

THE COURT: Well, I think basically, that probably is a conclusion for the Court to draw, but . . .

MR. WEINBERG: I was just asking the District Director's opinion on just what procedures should be followed at this time. What I'm trying to determine whether the District . . . (Simultaneous voices)

THE COURT: I think you should confine yourself, Mr. Weinberg, as to what he did at that particular time.

MR. WEINBERG: The purpose of the question, Your Honor, is that someone made a determination this should be a 6851 proceeding. I want to make . . . I want to know

who made the determination, it—I want to know whether Mr. FIELDS [44] told Mr. O'KEEFE (sic), that that was the way to do it, or whether Mr. FIELDS,—the opinions on this matter are perhaps, circumvented.

THE COURT: Well, I don't know that I understand the line of inquiry. I would like you to determine from the witness only what he did on the factual basis and, not what the conclusions that he may have drawn, in,—as a matter of law. That is for the Court's determination.

MR. WEINBERG: I will try to stay close to that line, Your Honor.

Examination Resumed By Mr. Weinberg:

Q. When you talked to Mr. O'KEEFE, after you told him the facts which were related to you by Mr. CURTIS, did you tell him anything specific as to what steps to take? A. No, we have set procedures and I knew that our men knew what to do and that's what I wanted them to do.

Q. Are those procedures in writing? A. They are.

Q. Are they in the United States Code of Regulations? A. I don't know what the Code they are in,—the Internal Revenue,—our Manual calls for the steps which we take and we follow them.

Q. So, you didn't tell Mr. O'KEEFE whether to follow jeopardy procedures, or whether to follow the 6851 procedures, [45] is that correct? A. That's true, because I didn't know the details, when these gentlemen get on the scene, they use their judgment.

MR. MULLENHOLZ: Your Honor, I am going to raise an objection on this ground. Mr. Weinberg is confusing this basic issue when he is talking about a jeopardy situation, or a 6851 situation. The District Director has already stated that he determined that the taxable year should be determined. That is the determination under 6851 that is the determination he made. So that I think the questions, where the District Director is being asked whether he determined 6851 or a jeopardy situation are serving merely to confuse the issues and confuse the District Director,—he made a 6851 Decision under that statute to determine the taxable year and so that I think Mr. Weinberg should phrase his questions as the statutes lie.

MR. WEINBERG: The United States against SCHRECK case says, Your Honor, once you determine the taxable year, then you may go into 6851. I don't think it's by any means clear.

THE COURT: Well, the relevance of these questions, I believe, will probably also have to be determined by the Court at the appropriate time. As we indicated earlier, we are not satisfied that we actually know what these particular [46] statutes or sections of the statutes hold, and how they applied at this particular time, and we figure we are operating under somewhat of a handicap. The reason for having the inquiry at this time, is to see if we can further this proceeding, because the gentlemen are present and save them some later inconvenience.

MR. WEINBERG: Then let me try to avoid legal issues and stick to the affidavit, Your Honor.

Examination Resumed By Mr. Weinberg:

Q. When did you determine the taxable years were terminated, is that when you determined there was jeopardy?

MR. MULLENHOLZ: Your Honor, that question . . . (Simultaneous voices) A. You're,—you're,—you're . . . (Simultaneous voices).

MR. MULLENHOLZ: I object to it.

MR. WEINBERG: I have only gone in to what he determined jeopardy, Your Honor.

A. I made no determination, whether there was jeopardy, or which section it would fall under. At this point, I couldn't tell, but I knew that my men who would be on the scene, would be in a position and have the knowledge to take whatever steps were necessary.

Q. And you say that "I found that these people were in the process of placing their assets beyond the reach of the Government and I determined that the taxable years were" [47] terminated." Did you do that both at the same time on the phone with Mr. CURTIS? A. Yes.

Q Okay. No more questions.

THE COURT: Any questions, Mr. Mullenholz?

MR. MULLENHOLZ: No, Your Honor.

(The witness having been excused, withdrew from the stand.)

JAMES R. PERRY, having been called as a witness was duly sworn by the Clerk and testified on his oath as follows:

EXAMINATION BY MR. WEINBERG:

Q. Tell the Court your name and address, Mr. Perry? A. James R. PERRY, 308 "Stimersvale"? Road, Waltham, Mass.

Q. What is your present occupation? A. Assistant Chief of Collections. Tax Payer Service Division, Boston District.

Q. What was your position back in June 24, 1972? A. Chief Collections, Tax Payer Service Division, Burlington, Vermont District.

Q. When were you first apprised of this matter? A. Saturday morning, June 24.

Q. Where were you? A. At my home on Grand Isle.

Q. And who apprised you of it? A. Joseph O'KANE, Chief of Intelligence Division, [48] Burlington District.

Q. And did you and Mr. O'KANE subsequently go to Derby Line? A. Right, he picked me up.

Q. What was the substance of the conversation he had with you on this morning? A. That the Customs had detained three people who had been turned back by the Canadian authorities early that morning, for failure to provide adequate identification on the return to the United States or local immigration people through conventional routine

search of the vehicle, discovered a large sum of cash hidden under the hood, between the engine and the fire wall. That was the extent of the knowledge that we had from Customs. Procedures are currently in existence, and were in existence then, relative to the administrative procedures used by I.R.S. to determined the, if the assessment, to determine if the assets are being removed from the country, if there is any additional tax and this was the extent of our conversation. Get the facts and make a determination whether we would proceed with our assessment.

Q. Did he communicate to you any directions from Mr. FIELDS? A. Specific directions, relative to that case?

Q. Yeah. [49] A. The general directions had . . . procedures were in existence. Mr. FIELDS' concern was to protect the revenue.

Q. Did Mr. O'KANE tell you Mr. FIELDS said the taxable years of these people were terminated? A. Well, it's sort of a foregone conclusion. Whether we made specific mention of it or not, we wouldn't . . . (interrupted) . . . have gone there, if we . . .(interrupted) didn't have that idea in mind.

Q. Did Mr. O'KANE tell you Mr. FIELDS made a finding that these funds in the trunk were in the process of being sent out of the country? A. I don't recall, no, sir.

Q. In your affidavit you say that Mr. FIELDS had directed that all necessary steps be taken to collect the tax liability of these three individuals? A. That's right.

Q. Who communicated to you, that there was any liability? A. Well, this was part of my responsibility, as Chief Collections Division within Vermont and all tax cases relative to all collection matters were within my jurisdiction. That was an on-going routine thing, so it didn't require specific instructions from the District Director that morning.

Q. So you say, "I was advised by Mr. O'Kane that Fulton FIELDS [50] had directed that all necessary steps be taken to collect the tax LIABILITIES OF THESE INDIVIDUALS"? A. Right, that was my responsibility, he directed me to report to Derby Line and determine the facts in this particular case.

Q. Before you entered Derby Line, had there been a determination that a tax liability was, in fact, present for these individuals? A. There was a sufficient basis there for me to go to Derby Line to determine if the taxable year should be terminated.

Q. You had an interview with Mr. LAING, Mr. KLEINHANS, and Miss REED, is that correct? A. Yes.

Q. Mr. KLEINHANS and Miss Reed, denied any possessory interest in that money, didn't they?

MR. MULLENHOLZ: Your Honor, I object to this, it is outside the scope of the affidavit. The only purpose here is to determine what steps were taken.

THE COURT: I agree. We'll exclude that question.

Q. During the interview, what was the purpose of the interview? A. To determine the nature of the income, the owner of the money.

[51] Q. And you had conversations with Mr. LAING and the other people? A. That's right.

Q. And your purpose was to try to determine whether that was an American taxable income?

MR. MULLENHOLZ: Your Honor, I object again, we are only interested in facts here, we are not trying to go into ..... (Interrupted)

MR. WEINBERG: I withdraw the question.

Q. Right after completing the interview, you say that you gave notice to Mr. LAING because they were attempting to put their assets out of reach, the taxable years had been terminated, was this notice in writing? A. No, it was an oral notice.

Q. It was an oral notice? A. Right, and witnessed by an Internal Revenue Agent.

Q. By the name of? A. Ralph D. MARTIN.

Q. And, what did you basically tell them? A. What did I basically tell them?

Q. What did you tell Mr. LAING when you say, "I gave him notice"? A. That his taxable year had been terminated as of June 24th and we were going to effect an assessment by [52] notifying our ANDOVER Service Center of approximately $310,000.00.

Q. Against each of them? A. You asked what I said to Mr. LAING. That's exactly what I said to Mr. LAING, — something relative to that termination and the amount of the assessment.

Q. Well, you had determined at this time, you were going to assess each of them $310,000.00, correct? A. That was the function of the outcome of the interviews. Right, and you arrived at the conclusion that they should be assessed $310,000.00, because that was the exact amount found in their car, correct?

MR. MULLENHOLZ: I object again. We are only asking what was done, not the basis for his determination. He's asking him again for a conclusion.

MR. WEINBERG: Your Honor, one of the three oppositions to the Motion To Dismiss, is the allegation under the ENOCHS case that the Government can use the words, "Used bad faith," in making these assessments, but they assessed these people $930,000.00, without an iota of information that this money was owed to the United States.

THE COURT: Well, Mr. Weinberg, let's confine our inquiry at the, at this time, to what was done and if later, to the Court appears germaine, or upon appropriate [53] motion to that effect, we can go into this further inquiry, but, at this time, I am only interested in what was, in fact, done and what the procedures were, — what procedures were that were followed.

MR. WEINBERG: Okay.

Examination Resumed By Mr. Weinberg:

Q. You demanded immediate payment of their tax liabilities in the amount of $310,000.00, correct? A. That's correct.

Q. And that was on oral demand? A. Yes.

Q. It was subsequent to giving oral notice that their taxable years had been terminated? A. Right.

Q. And when you made this demand, — I withdraw that. This demand was made before an assessment was made, correct? A. Yes, the — the — we had not received the confirmation that the assessment had been placed on the assessment list, but we .... (Interrupted).

Q. Had you contacted ANDOVER before making the demand? A. Yes.

Q. See if paragraph 6 is helpful in that, Mr. Perry. (Document handed the witness by counsel). A. (Reading silently) ..... Helpful in what respect?

[54] Q. Is it fair to say you demanded the money before you had contacted ANDOVER and asked them to go through the procedures to make an assessment? A. I contacted ANDOVER three or four times. We have several people to contact and I started off with the Director of the Service Center, so, at what point in time the assessment was actually made, I don't know, but it is really superfluous, because we knew that the assessment was going to be placed on the books as of June 24th, so at what point in time, it didn't really matter. Also, we did not, — we had sufficient information to determine that there — that there was taxable income with regard to one of, — or all three of these people.

MR. WEINBERG: May I go into that, Your Honor, the last sentence that "we had sufficient information to determine there was taxable income," or would that be beyond the purview of this examination?

THE COURT: Well, we'll take a limited inquiry into this aspect, then.

Q. What information did you have, in support of that last statement that you had sufficient information to determine that there was taxable income in . . (interrupted . . America? [55] A. Let's just deal with the facts of the case at this point in time .... (Simultaneous voices)

Q. I want to know what .. (Simultaneous voices) information .. A. What information? $300,000.00 cash. In a paisley print piece of luggage, hidden between the engine and the fire wall at 2:00 a.m. in the morning, attempting to cross into Canada, is sufficient information for me to seek further information relative to where it came from.

Q. To make an assessment? A. Certainly.

Q. And that was the information upon which you relied in making your assessment? A. That's part of the information.

Q. What other parts were there?

MR. MULLENHOLZ: Your Honor, I object. We are getting into this issue again; — we are beyond the scope of what was done. We are getting into the basis of the determination and I think that the issue to be determined is whether the Internal Revenue Service followed the procedures and not what the basis for its determination was. The question of what the proper basis is, or what the tax liability is in this situation, is properly to be handled in refund case, not in this type of situation. The only question here is whether or not the [56] Internal Revenue Service followed its procedures in seizing this money and that is the issue which I thought Your Honor had confined the examination to and not get into all of the ramifications and all the information which went behind the determination.

MR. WEINBERG: Surely, Your Honor, implicit in the procedures is something that says you can't make arbitrary assessments.

THE COURT: Well, at this particular time, I think you are now getting into the merits of your case. At this particular time, I am interested, primarily, in the procedures which were employed. Now, if later and after we get your additional memorandum, we get your itemization of procedures which were followed and we can put them in some orderly context, it may be in order for you to get into this particular area in connection with the Motion to Dismiss and for Summary Judgment, but at this particular time, I ask you to confine your inquiry only to what was actually done and not the reasons lying behind the procedures which were adopted.

Q. You contacted ANDOVER Service Center and requested the assessment be made? A. That's right.

Q. Have you ever seen the formal recording of assessment of Mr. LAING?

[57] MR. MULLENHOLZ: Objection, Your Honor.

MR. WEINBERG: Your Honor, the procedures say that assessments have got to be filed in this specific recording manner, and I just want to know whether this man has the first-hand knowledge, to know whether those procedures were followed in this case.

THE COURT: I think that is fair, too. We'll take the answer. A. Yes, that's so.

Q. You went to ANDOVER and saw them? A. No, they were mailed to the Burlington office subsequently.

Q. Copies of it? A. Right.

Q. Or, was the original notice .... (Simultaneous voices) A. The original notice was then mailed out to your client.

Q. At what address? A. Last known address that they gave Customs officials.

Q. Who was . . . (Simultaneously voices) . . . A. Together with the receipts for the money.

Q. With, — they were mailed with the receipts for the money? A. Not in the same envelope, but, both of those documents were mailed to .... (Interrupted) ..

Q. About how long after June 24th, were they mailed? [58] A. I don't know.

Q. So, you have other copies? A. I don't believe ... (Simultaneous voices)

MR. MULLENHOLZ: Your Honor, I object. A. I have five thousand other cases, so I don't recall at what point in time the notices were made.

Q. As part of the procedures to mail the assessments to the tax payers? A. As part of the procedures to ... (Interrupted) ...

Q. Is that a .... (Simultaneous voices)

MR. MULLENHOLZ: Your Honor, again .. (SV)

THE COURT: Just a minute. I didn't rule on the previous objection. Well, Mr. Weinberg, I think we are getting pretty far afield. I am having difficulty at this point, drawing a distinction between the merits of your case and what would be apropos for the termination of the defendant's motion. I just want, again, just what was done at this stage in time .... (Interrupted again)

MR. WEINBERG: Okay.

THE COURT: .... and later on, if it becomes significant, you can, we can go into it. in further detail.

MR. WEINBERG: Your Honor, I am just trying to confine myself to .... (Simultaneous voices) .. what happened ...

THE COURT: Just what he did .. (Simul. vcs) [59] A. To the assessment?

THE COURT: Well, just ask him what he did. ... (interrupted) and not the reasons for doing it.

Q. When did you receive the assessment from ANDOVER, if you know? A. I don't know.

Q. Now, you saw the assessment? A. The written assessment?

Q. You saw it? A. Yes, sir, that was at a subsequent point in time.

Q. What did it contain, if you know?

MR. MULLENHOLZ: Your Honor, I object. This is ... (Simultaneous voices) ... a, ... the affidavit is limited to what was done today, (Simultaneous voices)

MR. WEINBERG: Your Honor, the regulations *compel* specificity in the assessment, and that's one of the grounds that I allege in my opposition to the Motion to Dismiss and in my preliminary injunction.

THE COURT: Well, all right, we are going to terminate this examination at this particular time, in view of the fact that it is not furthering this cause as we had hoped that it would. We do ask that, ... and we will allow you a later opportunity to examine this witness, either by discovery or in the presence of the Court and we would ask, specifically [60] from the Government, that they cite the procedures which were followed in this instance, the authority for these procedures by way of regulation, and the appropriate sections of the statute and the theory of their case, so that we can make an intelligent determination as to the nature of the Government's claim in this instance and we would like those at the same time we have your Memorandum, and you can reply to those allegations in your reply Memorandum. We will then set another hearing as soon as we can at a reasonably convenient time and we may, of our own order, on our own order, have certain areas of inquiry we will want to cover in connection with that particular hearing.

No. 73-1808

SUPREME COURT, U. S.
FILED
JUN 14 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

JAMES BURNETT MCKAY LAING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1808

JAMES BURNETT MCKAY LAING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

1. Petitioner, a citizen of New Zealand, entered the United States from Canada on a temporary visitor's visa on May 31, 1972. On June 24, 1972, he and two companions were refused entry into Canada by Canadian officials. As a result, they returned to the United States where they were stopped at the border by United States Customs officials in Derby, Vermont. Upon a search of the vehicle in which petitioner and his companions were travelling, the customs officers found concealed in the engine compartment a suitcase containing more than $300,000 in United States currency (Pet. App. B 20).

After notification by the customs officials, the District Director of Internal Revenue, in Burlington, Vermont, determined that petitioner and those accompanying him were in the process of putting their assets beyond the

reach of the government by removing them from the United States, which would prejudice or render ineffectual the collection of income tax. Pursuant to the authority under Section 6851(a) of the Internal Revenue Code of 1954, the District Director declared the taxable years of the three individuals immediately terminated. Assessments were made against each individual of $310,000[1] for the period January 1, 1972, through June 24, 1972. Following their refusal to pay the tax, the money found hidden in the engine compartment of the automobile was levied upon and seized by the Internal Revenue Service. A portion of this sum was applied to the tax assessed against petitioner (Pet. App. B 20-21).

Petitioner thereupon commenced this suit in the United States District Court for the District of Vermont to enjoin the continued possession of the seized funds by the Internal Revenue Service. He urged that the bar of the Anti-Injunction Act (26 U.S.C. 7421(a)) against suits "for the purpose of restraining the assessment and collection of any tax * * *" was not applicable because the Internal Revenue Service had not issued a notice of deficiency to him prior to the seizure of the funds. Specifically, petitioner argued that there is an exception under Section 6213(a) of the Code to the bar of the Anti-Injunction Act where the Internal Revenue Service does not issue a notice of deficiency prior to assessment and collection.

Following the decision in *Irving* v. *Gray*, 479 F. 2d 20 (C.A. 2), the district court held that a notice of deficiency is not required when, as here, the Internal

[1]The assessment against petitioner was subsequently abated to $195,985.55 (Pet. App. B 21).

Revenue Service terminates a taxpayer's taxable year pursuant to Section 6851. It accordingly dismissed petitioner's suit for injunctive relief as prohibited by the Anti-Injunction Act[2] (Pet. App. B 19-27).[3] The court of appeals affirmed *per curiam* (Pet. App. A 15-18).

2. Although we believe that the decision below is correct, there is a direct conflict among the circuits on the question of the availability of injunctive relief against the collection of tax pursuant to the termination of a taxpayer's taxable year under Section 6851 without the issuance of a notice of deficiency. The Second Circuit in *Irving* v. *Gray*, *supra*, and in this case has held that in such circumstances actions to enjoin the seizure of property pursuant to the termination of a taxpayer's taxable year are barred by the Anti-Injunction Act, The Seventh Circuit in *Williamson* v. *United States*, 31 A.F.T.R. 2d 73-800 (unreported order of April 8, 1971), has also held in the context of a refund suit for taxes collected pursuant to a Section 6851 termination of a taxable year, that such a termination does not require

[2]The district court also rested its decision upon the tax exception to the Declaratory Judgment Act (28 U.S.C. 2201) (Pet. App. B22).

[3]The district court further determined that petitioner did not meet the narrow two-fold exception to the Anti-Injunction Act established by this Court in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, and most recently reaffirmed in *Bob Jones University* v. *Simon*, No. 72-1470, decided May 15, 1974; and *Commissioner* v. *"Americans United", Inc.*, No. 72-1371, decided May 15, 1974. It concluded that petitioner did not demonstrate that: (1) under no circumstances would the government ultimately prevail on the merits of its tax claim; and (2) that he was without an adequate remedy at law. In fact, petitioner has commenced a refund suit which is currently pending in the district court (D. Vt.-Civ. No. 73-137). The parties have recently filed a stipulation in that case that the trial be delayed until the disposition by this Court of this petition for certiorari or a decision on the merits.

the issuance of a notice of deficiency. To the contrary, however, the Sixth Circuit has held in *Rambo* v. *United States*, 492 F. 2d 1060, and in *Hall* v. *United States*, 33 A.F.T.R. 2d 74-903 (decided March 12, 1974), that the bar of the Anti-Injunction Act is inapplicable if, as here, the Internal Revenue Service terminates a taxpayer's taxable year under Section 6851 without the issuance of a notice of deficiency.

Moreover, the issue in this case is of particular importance to the administration of the federal tax laws. At present there are more than 70 cases pending in the federal courts involving this question[4] and it is expected that the number of cases will continue to increase.[5]

Accordingly, we do not oppose the granting of the petition for a writ of certiorari.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

---

[4]The issue presented here is also pending in the Third, Fourth, Fifth, and Ninth Circuits. Noting the divergent decisions in this area, the Tax Court has suggested that review by this Court is appropriate. *Jones* v. *Commissioner*, 62 T.C. No. 1, decided April 1, 1974, slip op. 6.

[5]We have been advised by the Internal Revenue Service that for the fiscal year 1972, it terminated the taxable years of more than 600 taxpayers and correspondingly assessed taxes in excess of $30 million. For the fiscal year of 1973, more than 1800 taxable years were terminated with assessments in excess of $60 million.

CORRECTED COPY

SUPREME COURT, U. S.
FILED
NOV 29 1974
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 73-1808.

JAMES BURNETT McKAY LAING,
PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA ET AL.,
DEFENDANTS-APPELLEES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for the Plaintiff-Appellant.

JOSEPH S. OTERI,
RUDOLPH F. PIERCE,
CHARLOTTE A. PERRETTA,
MARTIN G. WEINBERG,
CRANE, INKER & OTERI,
20 Ashburton Place,
Boston, Massachusetts 02108.
(617) 227-4882

ADDISON C. GETCHELL & SON, INC. · THE LAWYERS' PRINTER · BOSTON

Table of Contents.

Opinions below 1

Jurisdiction 1

Questions presented 2

Statutes involved 2

Statement of the case 2

Summary of argument 4

Argument 6

I. In all jeopardy proceedings the taxpayer is entitled to a deficiency notice as prescribed by 26 U.S.C. § 6861 6

A. Introduction 6

B. In a jeopardy situation the I.R.S. must find its assessment authority in § 6861 of subchapter A of chapter 70 and it cannot look beyond the procedures set forth therein 8

1. Express language of the provisions 8

2. Intent of the provisions 12

C. In a short year jeopardy assessment pursuant to § 6851, the thing assessed is a deficiency within the provisions of § 6211(a) of the 1954 Code 19

D. The assessment in a jeopardy situation under § 6851 constitutes an imposed tax 24

E. Conclusion 29

II. The procedures employed by the Service pursuant to its interpretation of the Internal Revenue Code of 1954 violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution 29

A. Introduction 29

B. An opportunity for a hearing must be granted to the taxpayer at a meaningful time and in a meaningful manner 32

1. The taxpayer's hardship 34

2. No compelling governmental interest exists to justify the delay 35

C. A taxpayer's property cannot be disposed of without due process of law 41

Conclusion 43

Addendum 45

Table of Authorities Cited.

Cases.

Aguilar v. United States, 501 F. 2d 127 (5th Cir. 1974) 38, 39, 40n

Clark v. Campbell, 501 F. 2d 108 (5th Cir. 1974) 7, 9, 10, 14, 16, 18, 19 et seq.

Enochs v. Williams Packing & Nav. Co., 370 U.S. 1 (1962) 38, 40n

Fuentes v. Shevin, 407 U.S. 67 (1972) 30, 32, 36, 38, 41, 43

Ginsburg v. United States, 278 F. 2d 470 (1st Cir. 1960) 38, 40n

Goldberg v. Kelly, 397 U.S. 254 (1970) 30, 32, 33, 36, 38, 41

Irving v. Gray, 479 F. 2d 20 (2d Cir. 1973) 4, 5, 6, 7, 8, 18, 19 et seq.

Laing v. United States, 364 F. Supp. 469 (D. Vt. 1973), aff'd, 496 F. 2d 853 (2d Cir. 1974) 1, 5, 8, 18, 19, 20, 22 et seq.

Lisner v. McCanless, 356 F. Supp. 398 (D. Ariz. 1973) 8, 9, 12

Littauer & Co. v. Commissioner of Internal Revenue Service, 37 BTA 840 (1938) 6, 7, 8, 13, 14, 19, 25 et seq.

Lloyd v. Patterson, 242 F. 2d 742 (5th Cir. 1957) 38

Lucia v. United States, 474 F. 2d 565 (5th Cir. 1973) 38

Melvin Bldg, Corp. v. Long, 262 F. 2d 920 (7th Cir. 1959) 38

Phillips v. Commissioner of Internal Revenue, 283 U.S. 589 (1931) 29, 30, 31, 32, 41

Pizzarello v. United States, 408 F. 2d 579 (2d Cir. 1969) 38

Puritan Church-The Church of America v. Commissioner, 10 CCH Tax Ct. Mem. 485 (1951) 6

Rambo v. United States, 492 F. 2d 1060 (6th Cir. 1974) 7, 10, 14, 16, 18, 21, 22 et seq.

Rimieri v. Scanlan, 254 F. Supp. 469 (S.D. N.Y. 1966) 39, 40n.

Nino Sanzogno v. Commissioner, 60 T.C. 321 (1973) 7, 27

Schreck v. United States, 301 F. Supp. 1265 (D. Md. 1969) 14, 16, 29, 33, 37

Shapiro v. Secretary of State, 499 F. 2d 527 (D.C. Cir. 1974) 23

Sniadach v. Family Finance Corp. 395 U.S. 337 (1969) 30, 32, 38, 41, 43

United States v. Bonaguro, 294 F. Supp 750 (E.D. N.Y. 1968) 40

United States v. Brodson, 234 F. 2d 97 (7th Cir. 1956) 38

United States v. Butler, 297 U.S. 1 (1936) 38
Veeder v. Commissioner, 36 F. 2d 342 (7th Cir. 1929) 38, 40n.
Williamson v. United States, 31 Am. Fed. Tax R. 2d 73-800 (7th Cir. 1973) 6, 7, 8, 20, 24, 25, 29
Willits v. Richardson, 497 F. 2d 240 (5th Cir. 1974) 39, 40n.

STATUTES.

United States Constitution
Fifth Amendment 2, 29, 31
Fourteenth Amendment 2, 29, 31
28 U.S.C. § 1254(1) 1
Internal Revenue Code of 1954, 26 U.S.C.
§ 441(b)(4) 24
§ 443(a)(3) 20, 21, 24, 25, 26n., 27
§ 6011 21
§ 6020 21, 25, 26n., 27
§ 6201 4, 10, 11, 12, 18
§ 6211(a) 5, 19, 20, 21, 22, 23, 27
§ 6213 4, 11, 36, 43
§ 6216 4, 11, 12
§ 6331 42
§ 6501 27
§ 6532 31n.
§ 6851 2, 3, 4, 5, 7, 8, 9 et seq.
§ 6861 2, 4, 6, 8, 10, 11, 12 et seq.
§ 7422 31n.

Subchapter A of chapter 70, §§ 6851-6873 5, 6, 7, 8, 10, 11, 12 et seq.
Subchapter B, §§ 6211-6216 11, 12
Internal Revenue Code of 1939, § 146 13
Revenue Act of 1918 § 250(g) 13
Revenue Act of 1924 14, 15
§ 274 15
§ 279 15
§ 308 15
§ 312 15
§ 900 15n
Revenue Act of 1926 14, 15
§ 279(a),(b),(c) 15
§ 274(a) 16
Treasury Regulation § 301.6211-1(a) 21, 22, 25

MISCELLANEOUS.

Comment, Jeopardy Assessment, the Sovereign's Stranglehold, 55 Georgetown L. J. 701 (1967) 34, 39, 40
H.R. Rep. No. 179, 68th Cong., 1st Sess. (1924) 14
Michael Kaminski, Ad. Law. Jud. Rev. of Jeop. Assessments Under the I.R.C., 14 Tax Law Rev. 545 (1958-59) 40
Seidman, Legislative History of Federal Income Tax Laws, 1938-1861 14
John H. Wahl, Jr., The Assessment and Collection of Federal Income Taxes, 3 Miami L.Q. 209 (1949) 37

Supreme Court of the United States.

October Term, 1974.

No. 73-1808.

JAMES BURNETT McKAY LAING,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA et al.,
Defendants-Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for the Plaintiff-Appellant.

Opinions Below.

The opinion of the Court of Appeals (App. C) is reported at 496 F. 2d 853 (2d Cir. 1974). The opinion of the District Court is reported at 364 F. Supp. 469 (D.Vt. 1973) (App. B).

Jurisdiction.

The judgment of the Court of Appeals was entered on May 2, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. Whether the Internal Revenue Service can employ 26 U.S.C. § 6851 to terminate a taxpayer's taxable year without following the procedure prescribed in 26 U.S.C. § 6861?

2. Whether the procedures followed by the Internal Revenue Service in performing its jeopardy assessment and seizure conformed to the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution?

Statutes Involved.

All pertinent statutes appear in the Addendum to this brief.

Statement of the Case.

On May 31, 1972, plaintiff, a citizen of New Zealand, entered the United States from Canada on a B-2 visa. On June 24, 1972, plaintiff and two companions attempted to enter Canada by way of Vermont but were refused entry into Canada by Canadian officials. Petitioner remained in the United States where he was stopped in an automobile by United States customs officials at Derby, Vermont. The customs officials conducted a search and discovered a suitcase containing approximately $310,000 in the engine compartment of the automobile and plaintiff-petitioner and his companions were detained at the border (A. 16).

Later that day, Fulton Fields, the District Director for the Internal Revenue Service for the District of Vermont, was advised by customs officials of the above facts, and, relying on them, found that petitioner and those with him were

in the process of putting their assets beyond the reach of the Government by removing them from the country, thereby tending to prejudice or render ineffectual this collection of the tax alleged to be due. Agent Fields then terminated the 1972 taxable years of the three individuals pursuant to 26 U.S.C. § 6851. Agent Fields sent two Internal Revenue Service agents, Joseph O'Kane, Chief of the Intelligence Division for the District of Vermont, and James Perry, Assistant Chief of the Collection and Taxpayer Service Division, Internal Revenue Service, Boston, Massachusetts, to the place of petitioner's detainment to take steps necessary to collect the tax liabilities of the petitioner and his companions (A. 16-17).

The agents interviewed plaintiff-petitioner and his associates and demanded immediate payment of their tax liabilities in the amount of $310,000 for each individual. Petitioner and his associates refused to make payments of their alleged tax liabilities and the agents contacted the Internal Revenue Service Center in Andover, Massachusetts, and requested and received orally a tax assessment upon each person in the amount of $310,000. The agents orally communicated the assessments to the plaintiff-petitioner and his associates and after a second refusal to make payment, the agents seized the money and applied it to the tax liabilities of the three individuals (A. 18-19).

Subsequently, on June 29, 1972, Edward Gallagher, Acting Director of the Internal Revenue Service in Burlington, Vermont, sent petitioner a written declaration made pursuant to 26 U.S.C. § 6851 informing petitioner that he was placing his assets beyond the reach of the Government and thus, his taxable year of 1972, was terminated and a tax of $195,985.55 for the period from January 1, 1972, to June 24, 1972, was assessed and made payable (A. 23-24).

On July 15, 1972, plaintiff-petitioner filed an equitable action seeking an injunction against the continued posses-

sion by the Internal Revenue Service of the seized money and seeking also a declaratory judgment that the provisions of the Internal Revenue Code under which the assessment and levy of his property were made were unconstitutional (A. 7-12, 19-20). On September 18, 1972, the defendants-respondents filed a motion to dismiss or in the alternative for summary judgment (A. 15). After hearings thereon, on September 12, 1973, the District Court (Coffrin, J.) entered an opinion and order which granted the Government's motion (A. 25-32). The District Court opinion was based substantially on the holding in *Irving* v. *Gray*, 479 F. 2d 20 (2d Cir. 1973), in which the United States Court of Appeals for the Second Circuit stated that § 6861 did not apply in the case of a jeopardy assessment made in respect to a departing or concealing taxpayer assessed under § 6851. Petitioner appealed and the Court of Appeals affirmed, adhering to its decisions in *Irving, supra.*

Summary of Argument.

Petitioner contends that the Internal Revenue Code sets forth a comprehensive, cross-related scheme of laws to regulate the collection of the internal revenue; and that one section cannot be employed or interpreted without reference to its place in the Code as a whole.

Proceeding from this contention, petitioner maintains that the express language of the relevant provisions of the 1954 Code, specifically, sections 6201(d), 6216(2), 6213(a), 6851 and 6861, require that the I.R.S. find its assessment authority in and follow the procedural requirements of § 6861 of subchapter A of chapter 70 in a quick termination proceeding pursuant to § 6851. This conclusion, petitioner submits, is supported by the legislative history of both § 6861 and § 6851.

The legislative history of these provisions evidences a clear intent by Congress to mitigate the harshness of the pay first-litigate later rule both in year-end deficiency situations and in jeopardy situations as well.

Further, petitioner contends that the court's holdings below in *Irving* v. *Gray*, 479 F. 2d 20 (2d Cir. 1973), and in *Laing* v. *United States*, 496 F. 2d. 853 (2d Cir. 1974), are erroneous in that they are predicated on three false assumptions:

1. that in a jeopardy proceeding pursuant to § 6851, the Service can find its assessment authority outside of subchapter A of chapter 70 (the jeopardy provisions);
2. the "thing" assessed in a jeopardy proceeding under § 6851 is not a deficiency within the definition of § 6211(a) of the 1954 Code; and
3. the amount assessed is not a tax imposed.

Additionally, petitioner asserts that the procedure followed by the Service in the case at bar does not conform to the requirements of due process, in that it is devoid of any notion of a "prompt post seizure" hearing in a situation where there exists no compelling governmental interest to justify the delay between assessment and seizure of petitioner's property and his first opportunity to appear before a judicial forum.

This contention is predicated on the following facts: (1) that the summary assessment and seizure procedure necessarily imposes a hardship on the taxpayer, (2) that after the taxpayer' property is seized, the compelling governmental interest to secure the collection of the internal revenue no longer exists, and (3) that after the internal revenue is secure the protection of the taxpayer's interest becomes paramount.

Petitioner concludes that the procedure followed by the Service is defective in that it allows the Service to circumvent all the procedural safeguards embodied in subchapter A of chapter 70, thereby making it possible for a taxpayer's property to be seized and sold without due process of law.

Argument.

I. In All Jeopardy Proceedings the Taxpayer is Entitled to a Deficiency Notice as Prescribed by 26 U.S.C. § 6861.

A. *Introduction.*

Petitioner argues herein that the Court of Appeals, in reliance upon its decision in *Irving* v. *Gray*, 479 F. 2d 20 (2d Cir. 1973), erroneously affirmed the dismissal of his complaint.

The erroneous holding in *Irving* is predicated upon three cases: *Littauer & Co.* v. *Commissioner of Internal Revenue Service*, 37 BTA 840 (1938); *Puritan Church-The Church of America* v. *Commissioner*, 10 CCH Tax Ct. Mem. 485 (1951); and *Williamson* v. *United States*, 31 Am. Fed. Tax R. 2d 73-800 (7th Cir. 1973).

In short, based on the *Littauer* holding, *supra*, 37 BTA at 843, and the *Puritan Church* decision, *supra*, 10 CCH Tax Ct. Mem. at 494, the *Williamson* court ruled:

> "[t]he deficiency notice requirement cannot be read into § 6851 because the assessment made under that section is not a deficiency as defined in § 6211. That section defines a deficiency as the amount by which the 'tax imposed' exceeds the amount shown as the tax return. The assessment in this case was not an imposed tax, but merely an amount which the I.R.S. believed justified the termination of the taxable year. Since no return had been filed at the date of the assessment, no deficiency was determinable. Ludwig Littauer & Co. Inc. v. Com'r of Int. Rev., 37 BTA 840, 843 (1938)." *Williamson, supra*, 31 Am. Fed. Tax R. 2d at 73-800.

Irving, supra, 479 F. 2d at 24, relied upon this holding, citing and quoting it, finding against the taxpayer. That this reasoning and logic has fallen into disrepute is evidenced not only by the opinions of the various Circuit Courts, but by a recent opinion of the Tax Court as well. Cf. *Clark* v. *Campbell*, 501 F. 2d 108 (5th Cir. 1974); *Rambo* v. *United States*, 492 F. 2d 1060 (6th Cir. 1974); *Nino Sanzogno* v. *Commissioner*, 60 T.C. 321 (1973). Indeed, it was noted that the *Sanzogno* case indicated that "the Tax Court is no longer comfortable with the *Littauer* rationale." *Clark, supra*, at 118.

Petitioner attacks the *Littauer-Williamson-Gray* trilogy on the ground that those cases fail to conform to the statutory requirements of the controlling sections of the Internal Revenue Code of 1954 and are instead predicated upon three incorrect assumptions:

1. In a jeopardy assessment situation under § 6851, subchapter A of chapter 70,[1] the I.R.S. can find its assessment authority in a provision outside the jeopardy assessment procedure set forth in subchapter A of chapter 70. *Littauer, supra*, 37 BTA at 842; *Williamson, supra*, 31 Am. Fed. Tax R. 2d at 73-800; *Gray, supra*, 479 F. 2d at 23-24.

2. In a short year jeopardy assessment under § 6851, the thing assessed is not a deficiency. *Littauer, supra*,

[1] 26 U.S.C. §§ 6851-6873.

37 BTA at 843; *Williamson, supra,* 31 Am. Fed. Tax R. 2d at 73-800; *Gray, supra,* 479 F. 2d at 24.

3. In a jeopardy situation under § 6851 the assessment does not constitute an "imposed tax." *Littauer,* 37 BTA at 843; *Williamson, supra,* 31 Am. Fed. Tax R. 2d at 73-800; *Gray, supra,* 479 F. 2d at 24.

These assumptions were extended to the case at bar: "We adhere to our decision in *Irving*. . . ." *Laing, supra,* 496 F. 2d at 854.

The errors in these assumptions are evidenced both by the specific language of the applicable sections of the Internal Revenue Code of 1954 and their legislative histories.

B. *In a Jeopardy Situation the I.R.S. Must Find its Assessment Authority in § 6861 of Subchapter A of chapter 70 and it Cannot Look Beyond the Procedures Set Forth Therein.*

1. Express Language of the Provisions.

When the express language of subchapter A of chapter 70 is studied, it is clear that the Service cannot go beyond its provisions to find its assessment authority. The Service's attempt to justify doing so is labyrinthine and futile; for provisions beyond subchapter A of chapter 70 only direct the Service back to its point of origination.

> "It is axiomatic that a true code—which Congress intended here to create—is primarily different from statutes in that a comprehensive cross-related scheme of laws is presented. No one section can be interpreted without reference to its place in the scheme. . . ." *Lisner* v. *McCanless,* 356 F. Supp. 398, 401-402 (D. Ariz. 1973).

In *Clark, supra,* 501 F. 2d at 121, the court noted, in citing *Lisner, supra,* that the Internal Revenue Code sets forth a "careful considered pattern" of laws to regulate the collection of internal revenue. A careful examination (or, as the *Clark* court described it, "we . . . painfully painstakingly dissect," *Clark, supra,* 501 F. 2d at 110) of the statutory language of the relevant provisions of the 1954 Code evinces the correctness of this assertion—that the Internal Revenue Code sets forth a "carefully considered pattern" of laws.

The actions of the Service are in disregard and in disruption of this coherent codification. In the case at bar, the Service insists that it can properly find its assessment authority, in a jeopardy situation under § 6851, outside the jeopardy assessment provisions of subchapter A of chapter 70.

In the present matter the Service believed that petitioner had placed his revenue in jeopardy as described in § 6851 which states, in pertinent part:

> "If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer, together with a demand for immediate payment of such findings and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year

> or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy."

Having closed petitioner's taxable year pursuant to § 6851, the Service contends that it can properly find its assessment authority in § 6201(a)(1), wherein it is stated:

> "The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title."

Section 6201, however, is entirely separate and apart from the assessment authority contained in subchapter A of chapter 70, *i.e.*, § 6861. As noted in *Clark, supra,* 501 F. 2d at 121, the distinction between the two sections (§ 6201 and § 6861) is that § 6201 is "the ordinary assessment provision," providing "generally the authority to assess uncontested taxes." It does not apply either to a year-end deficiency or to a jeopardy situation. *Clark, supra,* 501 F. 2d at 116-121; *Rambo, supra,* 492 F. 2d at 1062. This assertion is conclusively supported by § 6201(d), a cross-reference mandate which states:

> "For special rules applicable to deficiencies of income, estate, gift, and chapter 42 [private foundations] taxes, see subchapter B [§§ 6211-6216]."

The provisions of subchapter B, 26 U.S.C. §§ 6211-6216, prescribe those procedures to be followed in the situation where a normal year-end deficiency is involved. The assessment authority for such a situation is contained in § 6213, which provides, in pertinent part:

> "Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B [income taxes and estate and gift taxes, respectively] and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final."

Manifestly, the language of §§ 6201(d) and 6213 indicates the congressional purpose to create a comprehensive cross-related codification of laws to be followed by the Service in the collection of the internal revenue. This comprehensive scheme specifically directs the Service to subchapter A of chapter 70, 26 U.S.C. §§ 6851-6873, for the procedural requirements relating to assessment in jeopardy situations.

Section 6216 of subchapter B directs the Service to look elsewhere for its assessment authority in jeopardy situations by clearly stating:

> "For procedures relating to jeopardy assessments, see subchapter A of chapter 70."

Hence, the circle is complete and the Service returns to its point of origination. Subchapter A of chapter 70 presents only two situations in which income is in jeopardy. These situations are described in §§ 6851 and 6861. Yet, the lan-

guage of § 6216(2) does not limit its cross-reference mandate only to jeopardy situations under § 6861; rather, the cross-reference applies to all jeopardy situations in subchapter A, *i.e.*, it applies both to § 6851 and to § 6861. Thus, if the Service attempts to resort to § 6201 for its assessment authority (as it did in the case at bar) subsection (d) of that section (§ 6201) refers it to subchapter B (§§ 6211-6216) and § 6216(2) of this subchapter refers it back to subchapter A of chapter 70 "for procedures relating to jeopardy assessments." To ignore these congressional requirements is to extract and to isolate favorable provisions from a carefully enacted whole and to use those provisions as "wild cards" *without due regard for their place in the Code's comprehensive scheme. Lisner, supra,* 356 F. Supp. at 402. That this is what the Service seeks to do is clear because, as stated in *Lisner, supra,* 356 F. Supp. at 403:

> "Section 6861 is the *only* assessment authority in the Code designated 'jeopardy.' The attempt of the government to bypass the procedural requirements of section 6861 in this and other cases has led it on a path of convolutions and strained interpretations, instead of an attempt to find order in a highly structured code." (Emphasis in original.)

Petitioner contends that the express language of the statutes precludes the Service from seeking its assessment authority outside of subchapter A of chapter 70.

2. Intent of the Provisions.

The historical development of the statutory provisions here in discussion supports petitioner's position and is harmonious with the contentions advanced in support of the express language of the Code. Further, it detracts from the already "convolut[ed] and strained interpretations" of the Service.

Section 250(g) of the Revenue Act of 1918[2] provided the I.R.S. with the authority to terminate a taxpayer's taxable year before its normal completion and declare taxes, for the shortened period, immediately due and payable. A condition precedent to such action was a finding by the Service that there existed prejudicial activity by the taxpayer which threatened collection of his taxes. It was noted in *Littauer, supra,* 37 B.T.A. at 841, that "the section has been repeatedly enacted in its present form since its first appearance as section 250(g) of the Revenue Service Act of 1918," and it now stands as § 6851 of the 1954 Code.[3]

Under the 1918 Act, the short-term taxpayer was in the identical position as all other taxpayers against whom assessments had been made: he was required to pay the tax

---

[2] For purposes of comparison with 26 U.S.C. § 6851, § 250(g) states, in pertinent part:

> "If the Commissioner finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the tax for the taxable year then last past or the taxable year then current unless such proceedings be brought without delay, the Commissioner shall declare the taxable period for such taxpayer and shall cause notice of such finding and declaration to be terminated at the end of the calendar month then last past given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of said tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable."

[3] For a tracing of these "repeated enactments" from 1918 up to 1938, the year of the *Littauer* holding, see *Littauer, supra,* 37 B.T.A. at 841, fn. 2. The source of this section's original enactment into the 1954 Code as § 6851, with the exception of the new addition of § 6851(b), was § 146 of the 1939 Code.

first and then proceed with a refund suit. "In both situations the Commissioner may assure collection without awaiting the Board's redetermination." *Littauer, supra,* 37 B.T.A. at 842.

The harshness of the pay-first, litigate-later rule was deliberately mitigated by Congress in succeeding revenue acts, first in 1924 and again in 1926.

> "Although a taxpayer may, after payment of his tax, bring suit for the recovery thereof and thus secure a judicial determination of the questions involved, he cannot in view of section 3224 of the revised statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in non-liquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after his payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment." H.R. Rep. No. 179, 68th Cong., 1st Sess. (1924), cited in Seidman's *Legislative History of Federal Income Tax Laws, 1938-1861*, p. 759. See also: *Schreck* v. *United States*, 301 F. Supp. 1265, 1269 (D. Md. 1969); *Clark, supra,* 501 F. 2d. at 122; and *Rambo, supra,* 492 F. 2d at 1064.

To carry out its intent of deliberate mitigation, Congress established a non-prepayment forum, the Board of Tax

Appeals.[4] This new forum, coupled with §§ 279 (b), 274(a) and 308(a) of the 1924 Revenue Act, provided some respite for the dissatisfied deficient taxpayer in the non-jeopardy situation. (All three of the above-recited 1924 sections required the I.R.S. to send the normal deficient taxpayer a deficiency notice.) The power of the Service was still unaffected, however, in cases in which it believed the assessment or collection of a deficiency would be jeopardized by delay. In these situations, §§ 274(d) and 308(d) allowed the Service immediately to assess the tax and to demand immediate payment thereof without affording the taxpayer notice of the deficiency. In these circumstances, the only way in which the jeopardy assessment taxpayer could be heard by the Board of Tax Appeals was by filing a claim of abatement and posting a bond under §§ 279(a), (b) and 312(a), (b). If the taxpayer was unable to post a bond, his only remedy was then to pay the tax and later sue for a refund. Nevertheless, the salient features of the Revenue Act of 1924—(1) creation of the Board of Tax Appeals and (2) requirement of a deficiency notice to the non-jeopardy deficiency taxpayer—clearly established that Congress had made efforts to mitigate the harsh pay-first, litigate-later rule in its application to the non-jeopardy deficient taxpayer.

These rights and remedies, previously granted to the non-jeopardy deficient taxpayer only, were extended to the jeopardy income taxpayer in the Revenue Act of 1926. Whereas the jeopardy income taxpayers had been barred from the Board of Tax Appeals unless able to post a bond, the 1926 Act granted them the right to a redetermination of the jeopardy assessment by the Board of Tax Appeals after the assessment had been effectuated. Section 279(a), (b), (c) of the 1926 Act required the I.R.S. to send a no-

[4] See § 900, 1924 Revenue Act, Addendum p. 70.

tice of deficiency to the jeopardy income taxpayer within 60 days after the date of the assessment. Receipt of this notice enabled the jeopardy income taxpayer to petition for an adjudication by the Board of Tax Appeals within 60 days of the mailing of the deficiency notice under § 274(a) of the 1926 Act. The only manner in which this congressional intent, to mitigate the severity of the pay-first, litigate-later rule, can be implemented under the 1954 Code, in jeopardy assessment situations, is to require the Service to adhere strictly to the procedural mandates of subchapter A of chapter 70.

> "That procedure [§§ 279(a), (b), (c) and 274(a)] has been carried over to the present with slight changes and is now set forth in sections 6861, 6212(a) and 6213(a) of the 1954 Code." *Schreck, supra,* 301 F. Supp. at 1270; *Clark, supra,* 501 F. 2d at 122; and *Rambo, supra,* 492 F. 2d at 2064.

As indicated above, this is precisely what the relevant provisions of the 1954 Code require. Since § 6851 of the 1954 Code is clearly a jeopardy provision, then:

> "It is inconceivable . . . that Congress could have intended to have given this minimal procedural protection to jeopardy taxpayers against whom a deficiency is assessed at the end of the taxable year but not to taxpayers whose year is terminated under Sec. 6851." *Rambo, supra,* 492 F. 2d at 1064; *Clark, supra,* 501 F. 2d at 122.[5]

[5] The Service has argued in the past that it is conceivable, as evidenced by the fact that § 6851 was enacted prior to § 6861, and thus the former cannot be dependent upon the latter for assessment authority. This argument was rejected in *Clark, supra,* 501 F. 2d at 120, where the court, adopting *Schreck's* rejection, held:

> "[T]he evolution of our revenue system from an unintegrated collection of separate revenue acts through two careful codifications, may well create new affiliations between long existent, but formerly disparate provisions."

Subchapter A of chapter 70 of the 1954 Code contains assessment authority in one provision only, § 6861. This section likewise requires the Service to send a deficiency notice to the jeopardy income taxpayer:

> "§ 6861. Jeopardy assessments of income, estate, and gift taxes.
>
> "(a) Authority for Making.
>
> "If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.
>
> "(b) Deficiency letters.
>
> "If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment."

There is nothing in this section which precludes its applicability to petitioner's situation. Further, a reading of § 6861 indicates that the Service's contentions are self-defeating. The Service does not dispute that this section applies to jeopardy taxpayers against whom a deficiency is assessed at the end of the taxable year. Significantly,

§ 6851 applies to jeopardy of "the income tax for the current *or* the preceding taxable year" (emphasis supplied). If the Service's contentions are correct, that assessments for jeopardy situations under § 6851 can be made under § 6201, then the logical result of that contention clearly contravenes obvious congressional intent:

> "[I]f we were to find the assessment authority for a § 6851 deficiency in § 6201 rather than § 6861 we would in effect invite the IRS to evade the procedural safeguards so deliberately embodied in § 6861 *by relying on § 6851 when a jeopardy situation arises.* In this way the right to Tax Court review could be totally cut off for all jeopardy situations, both § 6851 and § 6861." *Clark, supra,* 501 F. 2d at 122 (emphasis supplied).

Petitioner submits that the express language of the Code restricts the government's assessment authority, in a § 6851 jeopardy situation, to § 6861. The history of the provisions herein disputed shows a clear and reasonable congressional intent:

> "Sections 6851 and 6861 both appear in Chapter 70, Subchapter A of the Internal Revenue Code under the heading 'Jeopardy.' Since Sec. 6851 does not authorize assessment for the tax which is found due for the terminated year, it is reasonable that Congress intended that the next succeeding section in the code (Sec. 6861), entitled 'Jeopardy Assessment,' should provide that authority." *Rambo, supra,* 492 F. 2d at 1064.

Thus, the first assumption relied upon by the court in *Irving, supra,* 479 F. 2d at 24, and again in the instant case, *Laing, supra,* 496 F. 2d at 854, is without proper and sound basis and is erroneous.

C. *In a Short Year Jeopardy Assessment Pursuant to § 6851, the Thing Assessed is a Deficiency Within the Provisions of § 6211 (a) of the 1954 Code.*

> "Tax Court jurisdiction to redetermine liability prior to payment is predicated on the existence of a deficiency within the meaning of the Code. Thus the formal deficiency notice prescribed by § 6213(a) or § 6861(a) . . . in the case of a jeopardy assessment has been described as '[a] ticket to the tax court.' Corbett v. Frank, 9 Cir., 1961, 293 F. 2d 501, 502. See Mason v. Commissioner, 5 Cir., 1954, 210 F. 2d 388. The Government argues that the liability created when a tax period is terminated pursuant to § 6851 and a tax is assessed is not a 'deficiency', and therefore the taxpayer is not entitled to petition the Tax Court for a redetermination." *Clark, supra,* 501 F. 2d at 116.

In *Irving, supra,* 479 F. 2d at 24, and axiomatically in *Laing, supra,* 496 F. 2d at 854, the court held that the Service need not follow the deficiency notice requirement in a short-term jeopardy assessment situation under § 6851. The holdings are based upon pedantic adherence to *Littauer, supra,* 37 BTA at 843.

> "It is only after such annual period expires that a determination of correct tax liability can be made, and not until then can it be determined whether there is a statutory deficiency or perhaps a refund of all or part of the amount already collected under section 146 [§ 6851]. In such circumstances, the amount called a 'deficiency' in the notice sent to the petitioner here is not an amount finally determined as a deficiency, and the proceeding to contest it is at this state premature."

This reasoning was echoed in *Williamson, supra,* 31 Am. Fed. Tax. R. 2d at 73-800: "Since no return had been filed at the date of the assessment, no deficiency was determinable."

Petitioner submits that the court should not have relied upon this specious logic in that it is based upon a misinterpretation of the term "deficiency" and a failure to recognize the existence of certain provisions of the 1954 Code as well as interpretive regulations promulgated by the Service.

Section 6211(a) of the 1964 Code[6] defines deficiency as the amount by which the tax imposed exceeds the amount shown as the tax by the taxpayer on his return. The court below, in both *Irving* and *Laing,* did not mention § 443(a)(3). That section, entitled "Returns for a period of less than 12 months" states, in pertinent part:

> "(a) Returns for short period.
>
> "A return for a period of less than 12 months (referred to in this section as 'short period') shall be made under any of the following circumstances:
>
> . . . . . .

[6] Section 6211(a), entitled "Definition of a deficiency," provides:

> "(a) In general.
>
> "For purposes of this title in the case of income, estate, gift and excise taxes, imposed by subtitles A and B, chapter 42, the term 'deficiency' means the amount by which the tax imposed by subtitles A or B or chapter 42 exceeds the excess of—
>
> "(1) the sum of
>
> "(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus
>
> "(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—
>
> (2) the amount of rebates, as defined in subsection (b)(2), made."

> (3) Termination of taxable year for jeopardy.
>
> "When the Secretary or his delegate terminates the taxpayer's taxable year under section 6851 (relating to tax in jeopardy)." See also, § 6011.[7]

Statutory use of the word "shall" leaves no doubt as to the duty of the Secretary when the taxable year is terminated due to jeopardy. "Sec. 443(a)(3) of the 1954 Code requires a return to be filed when the secretary terminates the taxable year under Sec. 6851." *Rambo, supra,* 492 F. 2d at 1064. Of equal import is § 6020(b) which again mandates the Secretary to make a return on behalf of the taxpayer when "any person fails to make any return . . . required . . . therefor, or makes, wilfully or otherwise, a false or fraudulent return."[8]

The existence of these provisions, §§ 443(a)(3), 6011, and 6020(b), indicates that Congress positively contemplated that a return would be filed when the I.R.S. terminated a taxpayer's taxable year under § 6851. These provisions also support the assertion that Congress likewise contemplated that a "deficiency" could be determined readily on the basis of the difference between the amount of the tax imposed and the amount shown as the tax on the taxpayer's return.

Contrary to the court's holding below, the absence of a tax return does not mean that "no deficiency was determinable." Pursuant to § 6211(a)(1), the I.R.S. promulgated Treasury Regulation § 301.6211-1(a) which states in plain, clear and unequivocal language:

[7] Addendum, p. 48.

[8] Section 6020(b) further provides:

> "(2) Status of returns.
>
> "Any return so made and subscribed by the Secretary or his delegate shall be prima facie good and sufficient for all legal purposes."

"If no return is made, or if the return . . . does not show any tax, for the purpose of the definition 'the amount shown as the tax by the taxpayer upon his return' shall be considered as zero. Accordingly, in any such case, if no deficiencies with respect to the tax have been made, *the deficiency is the amount of the tax imposed* by subtitle A, Chapter 11, or chapter 12 [income, estate or gift tax laws.]." See also: *Rambo, supra,* 492 F. 2d at 1164; *Clark, supra,* 501 F. 2d at 120.

The logic of this interpretation of § 6211(a) is supported and demonstrated by the facts of the case at bar. On June 29, 1972, the I.R.S. sent petitioner a correspondence informing him that his taxable year, 1972, had been terminated and a tax of $195,985.55, for the period of January 1, 1972, through June 24, 1972, was assessed and made payable. *Laing* v. *United States,* 364 F. Supp. 469, 471 (D.Vt. 1973). At this point, petitioner was clearly indebted to the United States Government. And, by his earlier action at Derby, Vermont, where he refused both to acknowledge his alleged tax liability and to pay it (A. 18-19), he was unmistakably and unequivocally denying any tax obligation to the United States. Hence, from his denial of the alleged tax liability, it was reasonable for the Service to conclude that petitioner claimed no tax liability to the government. Therefore, the "deficiency" according to Regulations, § 301.6211-1(a), is the amount by which the tax imposed, $195,985.55, exceeds the amount which the taxpayer claims he owes, zero.

"The letter which Rambo received from the District Director of the Internal Revenue Service stated: 'I declare the taxable period 1-1-72 thru 4-24-72 immediately terminated and the income tax for such period immediately due and payable.' The letter went on

to state that any part of the $28,488.88 which was unpaid would be immediately assessed against Rambo, as it in fact was. Clearly, the I.R.S. has imposed a tax and just as clearly the taxpayer has denied that he owes that amount by refusing either to pay the imposed tax or to file a return. Consequently, the tax imposed, $28,446.88, became the deficiency. *See* Schreck v. United States, *supra.*" *Rambo, supra,* 492 F. 2d at 1064.

Additionally, seizure of the taxpayer's property in satisfaction of the alleged tax is conclusive proof of his denial of any tax liability. This was noted by the court in *Shapiro* v. *Secretary of State,* 499 F. 2d 527, 531 (D.C. Cir. 1974):

"Moreover, '[i]f the Secretary [of the Treasury] or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.'[12] ([12] Int. Rev. Code § 6331(a). Levy and Distraint, Authority of Secretary or Delegate. It should be noted that section 6331(a) requires that the Commissioner provide a taxpayer prior notice of the demand for payment. The power to levy is inoperative until the subsequent 'failure or refusal' of the taxpayer to pay the required amount.)" (Footnote in parentheses.)

The liability created under § 6851 is the same type of "thing" as a deficiency, defined by § 6211. The court's assumption, that the "thing" assessed is not a deficiency, is based upon a distinction that is artificial, insignificant and erroneous.

D. *The Assessment in a Jeopardy Situation under § 6851 Constitutes an Imposed Tax.*

In *Williamson, supra,* 31 Am. Fed. Tax R. 2d at 73-800, the court concluded:

> "The assessment in this case was not an imposed tax, but merely an amount which the IRS believed justified the termination of the taxable year."

Irving, supra, 479 F. 2d at 24, and *Laing, supra,* 496 F. 2d at 854, adhered to this ruling. In short, the court "viewed this event not as the final imposition of a tax b[illegible] rather as a type of mandatorily imposed bond to ensure payment at the end of the normal taxable period." *Clark, supra,* 501 F. 2d at 118. Several provisions of the Code, however, demonstrate the fallaciousness of this conclusion.

Section 6851 states that the tax due under its provisions "become[s] immediately due and payable." This phrase does not suggest that the taxes are paid merely to secure a future debt; rather, they are paid to meet an immediate obligation to the United States Government. Secondly, as indicated earlier, § 443(a)(3) requires a tax return to be filed in jeopardy proceedings under § 6851. This indicates that Congress regarded a short term jeopardy assessment, under § 6851, as a final imposition of a tax for the shortened period. Thirdly, § 441(b)(3) clearly establishes that a "taxable year" can be a period consisting of less than 12 months, for that section states, in pertinent part:

> "(b) Taxable year.—
>
> "For purposes of this subtitle, the term 'taxable year' means—
>
> . . . . . .
>
> "(3) the period for which the return is made, if a return is made for a period of less than 12 months."

Had a return been filed in the instant case, either by the petitioner under § 443(a)(3) or by the Secretary on behalf of the taxpayer under § 6020, there would be no question that a tax had been imposed. *Williamson, supra,* 31 Am. Fed. Tax R. 2d at 73-800; *Littauer, supra,* 37 BTA at 843. The fact that the taxpayer has not met his obligation under § 443(a)(3), or the Service its obligation under § 6020(b), does not detract from the fact that the $195,985.55 amount is a tax imposed. If anything, the only conclusion that can be drawn from the fact that a return was not filed is that one of the two needed factors to determine the existence of a deficiency does not exist. But even this conclusion is without basis, for, as indicated above, if no return is filed for purposes of the definition of deficiency "the amount shown as the tax by the taxpayer upon his return shall be considered as zero." See: § 301.611-1(a), Internal Revenue Regulations. In short, the concept of "an imposed tax" is different in nature from the concept of "tax return." The failure to file a tax return has nothing to do with whether a tax has been imposed. Thus, the holdings of *Irving* and *Laing*, that the assessment was not an imposed tax, but merely an amount justifying termination of the taxable year, are patently incorrect.

A tax was imposed because, after receipt of the assessment, the taxpayer was indebted, as distinguished from being potentially indebted, to pay a tax to the United States Government which he was not obligated to pay the day before he received his assessment.

> "In short, where the day before he literally did not then owe a tax, he is on receipt of this demand required to pay *more* than what he was (the day be-

fore) obligated to do." (Emphasis in original.) *Clark, supra,* 501 F. 2d at 117-118.

This reasoning in *Clark* is further supported by § 6851(b) which allows the taxpayer or the Secretary to *reopen* the taxpayer's taxable year. This provision allows either the taxpayer or the Service to adjust the tax liability *actually determined,* as opposed to the tax liability potentially due, for the shortened period by reopening the taxable year.

All these factors [9] lead to the conclusion that a tax was clearly imposed irrespective of whether a return was filed. The imposition by the Service of an obligation not previously owed constitutes a tax imposed and the denial of that obligation by the taxpayer creates the additional factor which is subtracted from the imposed obligation to equal the deficiency. The following statement of the *Clark* court, *supra,* 501 F. 2d at 118, relative to whether the "thing" is a deficiency, is of equal import relative to whether the assessment is an imposed tax:

> "Although perhaps not legally significant, it is almost certain that the taxpayer who receives a letter terminating his tax year, assessing a tax in excess of his existing assets and demanding immediate payment of the alleged taxes due, and then shortly discovers that all of his existing assets have been seized, would find neither comfort nor reason in the IRS's explanation that the opportunity for prompt adjudication of the alleged liability is precluded because the 'thing' which has been assessed is not technically a deficiency."

[9] (a) The tax was immediately due and payable, § 6851; (b) the taxpayer was required to file a tax return, § 443(a)(3), or the Service was required to do so on the taxpayer's behalf, § 6020(b); (c) the amount of the assessment clearly would have been a tax imposed had the taxpayer or the Service in fact filed a return; and (d) the taxpayer or the Service can reopen the taxpayer's shortened period and make an adjustment thereto, § 6851(b).

Moreover, § 6211(a) in no way limits the definition of a deficiency, as suggested by the court below, *Laing, supra,* 496 F. 2d at 854, to a determination made only at the conclusion of the full taxable year. See: §§ 441(a)(3), 443(a)(3), 6020(b), 6211 and 6851. This fact was recently recognized by the Tax Court in *Nino Sanzogno* v. *Commissioner of Internal Revenue*, 60 T.C. 321, 325 (1973). Sanzogno, an opera maestro from Italy, earned approximately $8,000 during a week's performance in Chicago in 1965. Upon his departure to return to Italy, the IRS terminated his tax period, under § 6851(a), and required him to obtain his "sailing permit" pursuant to § 6851(d), by filing a form 1040C, a Departing Alien Income Tax Return. Sanzogno filed the form and departed. Three years later he received a notice of deficiency relative to his 1965 income. In contesting the alleged deficiency the maestro argued that by filing the form 1040C he had filed a return within the meaning of § 6501, entitled "Limitations on Assessment and Collection," and thus the statutory three-year limitation had expired and precluded the government from acting. The government argued that the form 1040C did not constitute a final return; rather, the maestro should have filed a form 1040B, at the close of his normal tax year, in order to trigger the statute of limitations. In rejecting the government's contentions, the court stressed that the Service itself had terminated the maestro's taxable year:

> "The taxable year of petitioner ended on October 19, 1965, the date that the district director terminated it. . . . Respondent argues that the taxable year is the calendar year 1965 because petitioner could have returned to the United States and earned additional income before December 31. If that had occurred, the district director could have reopened the taxable year of petitioner." *Sanzogno, supra,* 60 T.C. at 325.

This holding establishes that a taxable year is not of necessity co-terminus with the calendar year and implies that the assessment by the district director constitutes a tax imposed.

Noting that the opinion was not in harmony with *Littauer, supra,* Simpson, J., filed a concurring opinion directed at that point:

> "I wholly agree with the results reached by the majority. In my opinion, such results are inconsistent with the rationale of this Court's opinion in Ludwig Littauer & Co., 37 BTA 840 (1938), but in my judgment, that rationale should no longer be followed. See, Schreck v. United States, 301 F. Supp. 1265 (D. Md. 1969); see also, Rambo v. United States, 353 F. Supp. 1021 (W. D. Ky., 1972); Clark v. Campbell, 341 F. Supp. 171 (N.D. Tex., 1972). Compare Williamson v. United States, an unreported case, (N.D. Ill., 1969, 24 A.F.T.F. 2d 69-5561, 69-2 U.S.T.C. par. 9681)."

Petitioner submits that the assessment was an imposed tax because a deficiency was clearly determinable:

> "Thus the Tax Court now appears [from the *Sanzogno* holding] to recognize that from the taxpayer's standpoint a § 6851 quick termination brings the tax period to a close and creates a liability not unlike that which would exist at the close of the normal tax period. Such an interpretation supports the conclusion that the tax liability created subsequent to a § 6851 quick termination falls within the Codal definition of deficiency as amplified by the regulations." *Clark, supra* 501 F. 2d at 119.

Therefore, the third assumption upon which the *Irving, supra,* 479 F. 2d at 24, and *Laing, supra,* 496 F. 2d at 584, holdings are based is erroneous.

E. *Conclusion.*

In arguing against the three-fold foundation of *Irving* and *Laing,* petitioner has relied upon *Schreck, Rambo* and *Clark, supra.* Just as *Williamson* and *Irving* follow *Littauer, Rambo* and *Clark* follow *Schreck.* Thus, this dichotomy is in reality caused by *Littauer* and *Schreck.*

The *Schreck* position, which is indeed petitioner's, is based upon a review of the Internal Revenue Code of 1954 in its entirety, with solid support from a study of congressional intent. It is submitted that the *Littauer* position should no longer be of force as it conflicts not only with statutory language but with "compelling policies which vitiate against the vitality of that holding." See: *Schreck, supra,* 301 F. 2d at 1278. Since petitioner's dispute was resolved on the basis of *Littauer,* it is submitted that it was erroneously decided.

II. The Procedures Employed by the Service Pursuant to its Interpretation of the Internal Revenue Code of 1954 Violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

A. *Introduction.*

If the Code were interpreted as the Service suggests significant constitutional problems would arise:

> First, because the procedure followed by the Service does not permit a prompt post-seizure hearing following the seizure of the taxpayer's property, the procedure is violative of the requirements of due process; for there exists no compelling governmental interest to justify the long delay between the seizure of the taxpayer's property and his first opportunity to appear before a judicial forum. *Phillips* v. *Commis-*

sioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608 (1931); *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970); *Sniadach* v. *Family Finance Corp. of Bay View*, 395 U.S. 337, 89 S.Ct. 1820 (1969).

Second, the procedure followed by the Service circumvents the procedural safeguards available to other jeopardy income taxpayers and thus makes it possible for the taxpayer's property to be disposed of without due process of law. See, *Rambo, supra*, 492 F. 2d at 1064-1065.

While it has been held that the summary assessment and collection procedure for collecting the internal revenue of the United States is constitutionally permissible, *Phillips, supra*, 283 U.S. 589, 51 S.Ct. 608 (1931), this procedure has been justified on the basis that the taxpayer has adequate *post*-seizure access to the courts.

> "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, *adequate opportunity* is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained." *Phillips, supra*, 283 U.S. at 595, 51 S.Ct. at 611. (Emphasis supplied.)

The procedure followed by the Service in the instant case and accepted by the court below in *Irving, supra*, 497 F. 2d at 24, and in *Laing, supra*, 496 F. 2d at 854, limits the taxpayer's access to a judicial forum for a refund suit which cannot be commenced until at least "six months

after filing" his full year tax return.[10] *Irving, supra*, 479 F. 2d at 24. The necessity for the taxpayer to endure this tremendous delay between summary assessment and seizure under § 6851 and access to a judicial forum to contest the Service's actions renders this procedure violative of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. See *Phillips*,

---

[10] 26 U.S.C. § 7422. Civil actions for refund.

"(a) No suit prior to filing claim for refund.

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

26 U.S.C.A. § 6532. Periods of limitation on suits.

"(a) Suits by taxpayers for refund.

"(1) General rule.

"No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary or his delegate renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

These two provisions are the basis for the court's statement in *Irving, supra*, 479 F. 2d at 24, that a refund suit cannot be commenced until 6 months after the filing of a full year's tax return.

The inadequacy of this remedy is fully discussed in *Schreck, supra*, 301 F. Supp. at 1279-1280; see also, *Rambo, supra*, 492 F. 2d at 1062; *Clark, supra*, 501 F. 2d at 123; and will not be rediscussed here.

supra, 283 U.S. 589, 51 S.Ct. 608 (1931); *Fuentes, supra*, 407 U.S. 67, 92 S.Ct. 1983 (1972); *Goldberg, supra*, 397 U.S. 254, 90 S.Ct. 1011 (1970); *Sniadach, supra*, 395 U.S. 337, 89 S.Ct. 1820 (1969).

B. ***An Opportunity for a Hearing Must be Granted to the Taxpayer at a Meaningful Time and in a Meaningful Manner.***

To be sure, *Phillips* was recently cited with approval by this court in *Fuentes, supra*, 407 U.S. at 72, 92 S.Ct. at 1999-2000. However, *Phillips, supra*, as indicated above, was predicated on the fact that the taxpayer was afforded an immediate post-seizure opportunity to contest the government's actions. This fact was reaffirmed in *Fuentes, supra*. For, in *Fuentes, supra*, 407 U.S. at 90, 92, S.Ct. at 1999, the court balances the "postponement" of judicial access against the situation requiring it to determine if the need is "truly unusual."

> "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing . . . . These situations, however, must be truly unusual."

By recognizing the need to postpone a judicial hearing in a "truly unusual" situation, this court was not suggesting that the hearing be postponed for an egregious length of time, in the absence of a compelling governmental interest. This conclusion is supported by this court's statement that:

> "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo*, 380 U.S. 545, 552." *Fuentes, supra*, 407 U.S. at 80, 92 S.Ct. at 1994.

A similar balancing of interest was performed by this court in *Goldberg, supra*, 397 U.S. at 262-263, where the court observed:

> "The extent to which procedural due process must be afforded the recipient [here, the taxpayer] is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 [71 S.Ct. 624, 647, 95 L. Ed. 817] (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's [taxpayer's] interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 [81 S.Ct. 1743, 1748-1749, 6 L. Ed. 2d 1230] (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' See also *Hannah* v. *Larche*, 363 U.S. 420, 440, 442 [80 S.Ct. 1502, 1513, 1514, 4 L. Ed. 2d 1307] (1960)."

Since the only "truly unusual" circumstance, according to the Service, is its need immediately to collect the internal revenue, there is no justification for unnecessarily prolonging the taxpayer's access to a judicial forum once the revenue is collected. Yet, the procedure followed by the Service in the instant case does precisely that; that is, it totally ignores this balancing of interest by restricting the taxpayer's access to a judicial forum for a refund suit, thereby prolonging his "grievous loss" for absolutely no compelling governmental interest. All other jeopardy income taxpayers are afforded a prompt post-seizure opportunity for litigation in the Tax Court. *Schreck, supra*, 301 F. Supp. at 1280.

1. The Taxpayer's Hardship.

> "The consequences of a jeopardy assessment almost always results in an unalterable change of situation for the individual taxpayer. Jeopardy assessments are most often levied upon those whose assets allegedly do not cover their liabilities, and they may result in the freezing of assets with the following effect: Real threat to the assets continued existence, prevention of posting of the necessary bond, impossibility of adequate defense, and eventual loss of the property at a forced sale." Comment, *Jeopardy Assessment, The Sovereign's Stranglehold*, 55 Georgetown L. J. 701. 726 (1967).

The "grievous loss" suffered by petitioner in the case at bar is readily apparent. First, petitioner had approximately $310,000 of his funds seized.[11] It is inconceivable that

[11] Although the following information is not part of the record, petitioner respectfully requests this Court to take judicial notice of the following information as it removes any question as to the Service's position with respect to petitioner's interest in the seized funds. Petitioner made a similar request of the Second Circuit Court of Appeals in the proceeding below.

On March 1, 1973, petitioner filed a claim for refund with the Internal Revenue Service for $114,014.45 (the difference between $310,000 and the tax of $195,985.55 assessed against petitioner on June 24, 1972). This claim for refund was denied by the Internal Revenue Service on March 9, 1973, for the following reason:

> "Claim for refund of $114,014.45 is based on the ground that since the taxpayer paid estimated taxes of $310,000.00 on his return for the period of January 1, 1972 to June 24, 1972; and since the tax liability for this period is $195,985.55, the difference of $114,014.45 is due the taxpayer.
>
> "The claim for refund is disallowed in full since there is no overpayment on taxpayer's short-period return beginning January 1, 1972 and ending June 24, 1972 because the amount paid on the tax liability is $100,100.00 in lieu of the $ 310,000.00 claimed as paid; and, further, it has not been established that any funds applied in excess of $100,100.00 are solely the property of the taxpayer."

even the wealthiest person would not regard the loss of such sum of money as a hardship. Additionally, petitioner is a citizen of New Zealand who currently resides in Wales. In order fully to pursue his legal rights, he is now required not only to endure the absence of his funds until after the full taxable year but also to commence both a refund suit, and, if he intends to seek a refund of all of his funds, costly litigation to establish his ownership of all of his funds seized. Such litigation will clearly be costly both in time and in money. It will undoubtedly require trips back and forth across the Atlantic for depositions and court appearances. Moreover, even if petitioner follows the court's pronouncement in *Irving, supra,* 479 F. 2d at 24, and waits before filing the refund suit until six months after filing his full year's tax return, it is not likely that he will receive a hearing on the merits of the suit for another three to six months. During all of this period, of course, the government's interest will be fully protected while the financial hardship occasioned upon the taxpayer by the procedure followed by the Service continues to mount.

2. No Compelling Governmental Interest Exists to Justify the Delay.

No justification exists for prolonging the "grievous loss" occasioned upon petitioner by the jeopardy assessment and seizure. The jeopardy assessment and seizure under § 6851 was performed because

> "[T]he Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay. . . ." § 6851.

Once the tax is assessed and the taxpayer's property is seized, the compelling governmental interest to secure the collection of internal revenue of the United States no longer exists. The revenue is secure. The balancing of interest then ought to shift its focus from a concern for the protection of the internal revenue of the United States to a concern for protecting the interests of the taxpayer. See, *Fuentes, supra,* 407 U.S. at 90, 92 S.Ct. at 1999; *Goldberg, supra,* 397 U.S. 254, 262-263, 90 S.Ct. 1011. Since the jeopardy assessment and seizure causes the taxpayer to endure a hardship, due process requires, at least, that the taxpayer receive an opportunity for a post-seizure hearing as promptly as possible.

> "Where the taxpayer's assets have been frozen, the only meaningful remedy is to obtain an adjudication of liability as promptly as possible. This is given to a § 6861 jeopardy taxpayer." *Clark, supra,* 501 F. 2d at 124.

The only provision contained in subchapter A of chapter 70 which provides the jeopardy income taxpayer with quicker access to a judicial forum than the procedure prescribed by the court below in *Irving, supra,* 479 F. 2d at 24, is § 6861. As indicated above, this provision requires that once the Service determines that the collection of a deficiency may be jeopardized by delay and, consequently, immediately assesses a deficiency and demands payment thereof, it (the Service) must send a deficiency notice to the taxpayer within 60 days after the assessment. *Rambo, supra,* 492 F. 2d at 1062. Following receipt of the deficiency notice, the taxpayer may petition for a redetermination of the deficiency by the Tax Court within 90 days. § 6213(a). This procedure, at least, grants the jeopardy income taxpayer an opportunity to seek a judicial determination of his legal rights within five months after the seizure of his property. As indicated above, all other jeopardy income taxpayers are afforded this opportunity; *Schreck, supra,* 301 F. Supp. at 1280; *Clark, supra,* 501 F. 2d at 124. The existence of this opportunity in no way endangers the Service's interest in collecting the internal revenue. As the court observed in *Clark, supra,* 501 F. 2d at 126:

> "We fail to see how any legitimate government interest will be prejudiced by construing the law to permit the § 6851 quick termination taxpayer to seek a redetermination in the Tax Court before his assets are involuntarily applied to the liability. The opportunity for prompt review will hardly dry up the sources of revenue or stop the Government in its tracks since virtually all other taxpayers (§ 6861 jeopardy or otherwise) who desire to contest income tax liability prior to payment are currently allowed to do so. Nor will the purpose of § 6851 and § 6861—the avoidance of tax evasion—be thwarted since the Government will still be able to seize all of the taxpayer's available assets necessary to satisfy the potential liability prior to the Tax Court proceeding."

Further, the need for speedy access to a judicial forum is underscored by the fact that the assessment in a jeopardy proceeding is a completely arbitrary act performed by the Commisioner of the I.R.S. or his delegate without prior judicial review. Wahl, John H. Jr., *The Assessment And Collection Of Federal Income Taxes,* 3 Miami L.Q. 209, 214 (1949). The possibility of overassessment is, therefore, great. Given that this awesome power is reposed in the hands of one man, every opportunity must be made to allow the taxpayer access to a judicial forum as expeditiously as possible. Access is essential both to add regularity to the Commisioner's action and to protect the rights of the tax-

payer. Concededly, courts performing post-seizure judicial review seldom examine the propriety of the assessment, *Ginsburg* v. *United States*, 278 F. 2d 470, 742 (1st Cir. 1960); *Laing, supra*, 364 F. Supp. at 473, or the Commissioner's or his delegate's motivation in making it. *Veeder* v. *Commissioner*, 36 F. 2d 342, 345 (7th Cir. 1929); *Laing, supra*, 364 F. Supp. at 473. Nonetheless, these courts do examine such questions as the legality of the particular tax, *United States* v. *Butler*, 297 U.S. 1, 56 S. Ct. 312 (1936); *Melvin Bldg. Corp.* v. *Long*, 262 F. 2d 920, 922 (7th Cir. 1959); the liability of the petitioner to pay it, *Enochs* v. *Williams Packing & Nav. Co.*, 370 U.S. 1, 28, 82 S.Ct. 1125, 1129 (1962); *Rambo* v. *United States*, 492 F. 2d at 1064 (6th Cir. 1974); *Aguilar* v. *United States*, 501 F. 2d 127 (5th Cir. 1974), the accuracy of the amount to be paid, *Clark* v. *Campbell*, 501 F. 2d 108 (5th Cir. 1974); *Lucia* v. *United States*, 474 F. 2d 565, 574 (5th Cir. 1973); *Pizzarello* v. *United States*, 408 F. 2d 579, 583-584 (2d Cir. 1969), and the possible violation of the taxpayer's constitutional rights. *Lloyd* v. *Patterson*, 242 F. 2d 742, 744 (5th Cir. 1957); *United States* v. *Brodson*, 234 F. 2d 97, 99 (7th Cir. 1956). From the taxpayer's point of view, an opportunity for an expeditious post-seizure hearing to examine even these limited questions is better than nothing; for, to him, the quicker his access to a judicial forum, the greater the likelihood of removing or mitigating his financial hardship.

Petitioner remains unconvinced, however, that even this "better-than-nothing" situation comports with the requirements of due process. See: *Sniadach, supra*, 395 U.S. at 343, 89 S. Ct. at 1823 (concurring opinion of Harlan, J.); *Goldberg, supra*, 397 U.S. at 270, 90 S. Ct. at 1021; *Fuentes, supra*, 407 U.S. at 80, 92 S. Ct. at 1994. While the petitioner concedes that, in some cases, the normal assessment procedure may indeed be too slow to protect the government's interest in collecting the internal revenue, it is equally clear

to the petitioner that there is a tremendous opportunity of abuse inherent in the present method of determining jeopardy. 55 Georgetown L.J. at 730. Indeed, in the recent case of *Willits* v. *Richardson*, 497 F. 2d 240, 246 (1974), the Fifth Circuit Court of Appeals was constrained to state:

> "The IRS has been given broad power to take possession of the property of citizens by summary means that ignore many basic tenets of pre-seizure due process in order to prevent the loss of tax revenues. Courts cannot allow these expedients to be turned on citizens suspected of wrongdoing—not as tax collection devices but as summary punishment to supplement or complement regular criminal procedures."

The same court was required to make a similar statement a few months later in *Aguilar, supra*, 501 F. 2d at 130-131.

> "On the face of the record . . . a non-resident alien who has no income from any sources in the United States whose truck and money are geographically within the United States for the purpose of purchasing legitimate commercial supplies, has money and truck taken peremptorily from him at the instance of drug law enforcers with no more than a vague suggestion that the Government 'suspected' that these strangers were trafficking in drugs. Adding to the mystery of the basis for that "suspicion' is the total—the word is total—lack of any basis for computing the quick terminated tax to be $12,774.00—almost the precise total of the money and the value of the truck—a pattern followed often in the contemporary practice where tax mechanisms are employed 'not as tax collection devices but as summary punishment to supplement or complement regular criminal procedures.'" See also, *Rinieri* v. *Scanlon*, 254 F. Supp. 469, 472-473 (S.D. N.Y. 1966);

United States v. *Bonaguro*, 294 F. Supp. 750, 753, 754 (E.D. N.Y. 1968); *Clark, supra*, 501 F. 2d at 117, fn. 28.

These cases not only illuminate the need for thorough judicial scrutiny of the Service's actions, but also strongly suggest that the quick termination procedure is being employed for purposes other than to secure the collection of the internal revenue.[12]

In view of this awesome power possessed by the I.R.S. with its inherent opportunity for abuse, "it is therefore difficult indeed to see how it is possible for a court to conclude that the decision to collect by 'jeopardy' which engenders such suppression is not subject to review." Kaminsky, Michael. *Ad. Law. Jud. Rev. of Jeop. Assessments Under the I.R.C.*, 14 Tax Law Rev. 545, 557 (1958-59). See also, 55 Georgetown L.J., *supra*, at 728-729. Yet, numerous courts have reached this conclusion.[13]

It is precisely because the power possessed by the I.R.S. is so awesome and the corresponding hardship imposed upon the taxpayer so severe, that the petitioner contends that due process, in a jeopardy proceeding, actually requires:

1. that the taxpayer have an opportunity to appear before a judicial forum as soon as practicable *after* the seizure of his property;

2. that the I.R.S. establish at least the "probable validity" of its jeopardy assessment, *Sniadach, supra*, 395 U.S. at 343, 89 S. Ct. at 1823;

3. that, upon the determination by the court of the probable validity of the jeopardy assessment, it then determine:

(a) the liability of the taxpayer to it;

(b) the accuracy of the amount to be paid; and

(c) the violation of any collateral constitutional rights.

[12] In view of the court's statement in *Willits, supra*, 497 F. 2d at 246, and the observation of the court in *Aguilar, supra*, 501 F. 2d at 130-131, regarding the basis of the Service's action, and the holding of the court in *Rinieri, supra*, 254 F. Supp. at 472-473, it is important to reiterate that petitioner was originally assessed a tax liability ($310,000) which corresponded exactly to the amount of his money seized.

[13] *Ginsburg, supra*, 278 F. 2d at 472; *Laing, supra*, 364 F. Supp. at 473; *Veeder, supra*, 36 F. 2d at 345; *Enochs, supra*, 370 U.S. at 28, 82 S. Ct. at 1129.

In any case, the procedure followed by the I.R.S. in the case at bar violates due process because it is *totally devoid* of any notion of a "prompt" post-seizure hearing while simultaneously no governmental interests exists to justify the unnecessarily long delay between the jeopardy assessment and seizure and the taxpayer's opportunity to appear before a judicial forum. See, *Phillips, supra*, 283 U.S. at 598, 51 S. Ct. at 612; *Goldburg, supra*, 397 U.S. at 262-263, 90 S. Ct. 1011; *Sniadach, supra*, 395 U.S. at 343, 89 S. Ct. at 1823. Therefore, the procedure followed by the Service in the instant case violates due process because it fails to provide the taxpayer with an opportunity to be heard "at a meaningful time and in a meaningful manner." *Fuentes, supra*, 407 U.S. at 80, 92 S.Ct. at 1994.

C. *A Taxpayer's Property Cannot be Disposed of Without Due Process of Law.*

"A system that permits the government to seize and sell property without affording the taxpayer any opportunity for a judicial determination of the validity of the tax prior to payment could very well raise a serious question of a denial to the taxpayer of his property without due process of law. *Cf. Fuentes* v. *Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 1999, 32 L. Ed. 2d 556 (1972),

and *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969)." *Rambo, supra,* 492 F. 2d at 1065.

The Service's interpretation of § 6851 results in a denial of due process because under its interpretation a taxpayer's property can be disposed of before the taxpayer receives access to a judicial forum. See § 6331(a) & (b), entitled "Levy and distraint."[14]

As noted throughout this brief, subchapter A of chapter 70 creates only two types of jeopardy situations. See, §§ 6851 and 6861. Jeopardy income taxpayers under § 6861 are entitled to due process protections. See § 6863 (Stay of collection of jeopardy assessments).[15] The Service's contention leads to the conclusion that jeopardy income taxpayers under § 6851 would not be entitled to these due process protections. See *Rambo, supra,* 492 F. 2d at 1064. Justification or support for this distinction between jeopardy income taxpayers under § 6851 and jeopardy income taxpayers under § 6861 can be found nowhere in the Code. Moreover, if the Service's contention were to prevail no jeopardy income taxpayer would necessarily be entitled to these due process protections

> "[I]f we were to find the assessment authority for a § 6851 deficiency in § 6201 rather than in § 6861 we would in effect invite the IRS to evade the procedural safeguards so deliberately embodied in § 6861 by relying on § 6851 when a jeopardy situation arises. In this way the right to Tax Court review could be totally cut off for all jeopardy situations, both § 6851 and § 6861." *Clark, supra,* 501 F. 2d at 122.

[14] Addendum, p. 52.

[15] Addendum, p. 61-62.

The Service's contention that it alone can decide who shall and who shall not be afforded due process guarantees is abhorrent to the most basic and fundamental notions of an orderly system of liberties. *Sniadach, supra,* 395 U.S. 337, 89 S.Ct. 1820; *Fuentes, supra,* 407 U.S. 67, 92 S.Ct 1983.

Conclusion.

For the reasons discussed above, petitioner respectfully requests that this Court reverse the decision of the court below affirming the dismissal of his complaint and order that an injunction issue pursuant to § 6213(a) restraining the government from continuing in its possession of petitioner's property.

Respectfully submitted,

JOSEPH S. OTERI,
RUDOLPH F. PIERCE,
CHARLOTTE A. PERRETTA,
MARTIN G. WEINBERG,
CRANE. INKER, & OTERI.

Addendum.

26 U.S.C.

SEC. 441. PERIOD FOR COMPUTATION OF TAXABLE INCOME.

[Sec. 441(a)]

(a) COMPUTATION OF TAXABLE INCOME.—Taxable income shall be computed on the basis of the taxpayers' taxable year.

[Sec. 441(b)]

(b) TAXABLE YEAR.—For purposes of this subtitle, the term, "taxable year" means—

(1) the taxpayer's annual accounting period, if it is a calendar year or a fiscal year;

(2) the calendar year, if subsection (g) applies; or

(3) the period for which the return is made, if a return is made for a period of less than 12 months.

SEC. 443. RETURNS FOR A PERIOD OF LESS THAN 12 MONTHS.

[Sec. 443(a)]

(a) RETURNS FOR SHORT PERIOD.—A return for a period of less than 12 months (referred to in this section as "short period") shall be made under any of the following circumstances:

(1) CHANGE OF ANNUAL ACCOUNTING PERIOD.—When the taxpayer, with the approval of the Secretary or his delegate, changes his annual accounting period. In such a case, the return shall be made for the short period beginning on the day after the close of the former taxable year and ending at the close of the day before the day designated as the first day of the new taxable year.

(2) TAXPAYER NOT IN EXISTENCE FOR ENTIRE TAXABLE YEAR.—When the taxpayer is in existence during only part of what would otherwise be his taxable year.

(3) TERMINATION OF TAXABLE YEAR FOR JEOPARDY.—When the Secretary or his delegate terminates the taxpayer's taxable year under section 6851 (relating to tax in jeopardy).

SEC. 6011. GENERAL REQUIREMENT OF RETURN, STATEMENT, OR LIST.

[Sec. 6011(a)]

(a) GENERAL RULE.—When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make are a return or statement shall include therein the information required by such forms or regulations.

SEC. 6020. RETURNS PREPARED FOR OR EXECUTED BY SECRETARY.

[Sec. 6020(a)]

(a) PREPARATION OF RETURN BY SECRETARY.—If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary or his delegate may prepare such return, which, being signed by such person, may be received by the Secretary or his delegate as the return of such person.

[Sec. 6020(b)]

(b) EXECUTION OF RETURN BY SECRETARY.—

(1) AUTHORITY OF SECRETARY TO EXECUTE RETURN.—If any person fails to make any return (other than a declaration of estimated tax required under section 6015) required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary or his delegate shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

(2) STATUS OF RETURNS.—Any return so made and subscribed by the Secretary or his delegate shall be prima facie good and sufficient for all legal purposes.

SEC. 6201. ASSESSMENT AUTHORITY.

[Sec. 6201(a)]

(a) AUTHORITY OF SECRETARY OR DELEGATE.—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) TAXES SHOWN ON RETURN.—The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title.

. . . . . .

[Sec. 6201(d)]

(d) DEFICIENCY PROCEEDINGS.—

For special rules applicable to deficiencies of income, estate, gift, and chapter 42 taxes, see subchapter B.

SEC. 6211. DEFINITION OF A DEFICIENCY.

(a) IN GENERAL.—For purposes of this title in the case of income, estate, gift, and excise taxes, imposed by subtitles A and B, and chapter 42, the term "deficiency" means the amount by which the tax imposed by subtitle A or B or chapter 42 exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

SEC. 6212. NOTICE OF DEFICIENCY.

[Sec. 6212(a)]

(a) IN GENERAL.—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 42, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

[Sec. 6212(c)]

(c) FURTHER DEFICIENCY LETTERS RESTRICTED.—

(1) GENERAL RULE.—If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided

in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar quarter, of estate tax in respect of the taxable estate of the same decedent, of section 4940 tax for the same taxable year, or of chapter 42 tax (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiences before the Tax Court), in section 6213(b)(1) (relating to mathematical errors), or in section 6861(c) (relating to the making of jeopardy assessments).

(2) CROSS REFERENCES.—

For assessment as a deficiency notwithstanding the prohibition of further deficiency letters, in the case of—

(A) Deficiency attributable to change of election with respect to the standard deduction where taxpayer and his spouse made separate returns, see section 144(b).

(B) Deficiency attributable to gain on involuntary conversion, see section 1033(a)(3)(C) and (D).

(C) Deficiency attributable to gain on sale or exchange of personal residence, see section 1034(j).

(D) Deficiency attributable to war loss recoveries where prior benefit rule is elected, see section 1335.

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) TIME FOR FILING PETITION AND RESTRICTION ON ASSESSMENT.—Within 90 days, or 150 days if the notice is ad-

dressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

[Sec. 6213(b)]

(b) EXCEPTIONS TO RESTRICTIONS ON ASSESSMENT.—

(1) MATHEMATICAL ERRORS.—If the taxpayer is notified that, on account of a mathematical error appearing upon the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), or of section 6212(c)(1) (restricting further deficiency letters), or section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based

on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section.

(2) ASSESSMENT ARISING OUT OF TENTATIVE CARRYBACK ADJUSTMENTS.—If the Secretary or his delegate determines that the amount applied, credited, or refunded under section 6411 is in excess of the overassessment attributable to the carryback with respect to which such amount was applied, credited, or refunded, he may assess the amount of the excess as a deficiency as if it were due to a mathematical error appearing on the return.

(3) ASSESSMENT OF AMOUNT PAID.—Any amount paid as a tax or in respect of a tax may be assessed upon the receipt of such payment notwithstanding the provisions of subsection (a). In any case where such amount is paid after the mailing of a notice of deficiency under section 6212, such payment shall not deprive the Tax Court of jurisdiction over such deficiency determined under section 6211 without regard to such assessment.

[Sec. 6213(c)]

(c) FAILURE TO FILE PETITION.—If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary or his delegate.

[Sec. 6213(d)]

(d) WAIVER OF RESTRICTIONS.—The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed notice in writing filed with the Secretary or his delegate, to waive the restric-

tions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency.

[Sec. 6216]

SEC. 6216. CROSS REFERENCES.

(1) For procedures relating to bankruptcy and receivership, see subchapter B of chapter 70.

(2) For procedures relating to jeopardy assessments, see subchapter A of chapter 70.

(3) For procedures relating to claims against transferees and fiduciaries, see chapter 71.

SEC. 6331. LEVY AND DISTRAINT.

[Sec. 6331(a)]

(a) AUTHORITY OF SECRETARY OR DELEGATE.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient tto cover the expenses of the levy by levy) upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to

pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

[Sec. 6331(b)]

(b) SEIZURE AND SALE OF PROPERTY.—The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

[Sec. 6501(a)]

(a) GENERAL RULE.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

. . . . . .

[Sec. 6501(c)]

(c) EXCEPTIONS.—

(1) FALSE RETURN.—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed,

or a proceeding in court for collection of such tax may be begun without assessment, at any time.

SEC. 6532. PERIODS OF LIMITATION ON SUITS.

(a) SUITS BY TAXPAYERS FOR REFUND.—

(1) GENERAL RULE.—No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary or his delegate renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

SEC. 6851. TERMINATION OF TAXABLE YEAR.

(a) INCOME TAX IN JEOPARDY.—

(1) IN GENERAL.—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

(2) CORPORATION IN LIQUIDATION.—If the Secretary or his delegate finds that the collection of the income tax of a corporation for the current or the preceding taxable year will be jeopardized by the distribution of all or a portion of the assets of such corporation in the liquidation of the whole or any part of its capital stock, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable.

[Sec. 6851(b)]

(b) REOPENING OF TAXABLE PERIOD.—Notwithstanding the termination of the taxable period of the taxpayer by the Secretary or his delegate, as provided in subsection (a), the Secretary or his delegate may reopen such taxable period each time the taxpayer is found by the Secretary or his delegate to have received income, within the current taxable year, since a termination of the period under subsection (a). A taxable period so terminated by the Secretary or his delegate may be reopened by the taxpayer

(other than a nonresident alien) if he files with the Secretary or his delegate a true and accurate return of the items of gross income and of the deductions and credits allowed under this title for such taxable period, together with such other information as the Secretary or his delegate may by regulations prescribe. If taxpayer is a nonresident alien the taxable period so terminated may be reopened by him if he files, or causes to be filed, with the Secretary or his delegate a true and accurate return of his total income derived from all sources within the United States, in the manner prescribed in this title.

[Sec. 6851(c)]

(c) CITIZENS.—In the case of a citizen of the United States or of a possession of the United States about to depart from the United States, the Secretary or his delegate may, at his discretion, waive any or all of the requirements placed on the taxpayer by this section.

[Sec. 6851(d)]

(d) DEPARTURE OF ALIEN.—Subject to such exceptions as may, by regulations, be prescribed by the Secretary or his delegate—

(1) No alien shall depart from the United States unless he first procures from the Secretary or his delegate a certificate that he has complied with all the obligations imposed upon him by the income tax laws.

(2) Payment of taxes shall not be enforced by any proceedings under the provisions of this section prior to the expiration of the time otherwise allowed for paying such taxes, if, in the case of an alien about to depart from the United States, the Secretary or his delegate determines that the collection of the tax will not be jeopardized by the departure of the alien.

[Sec. 6851(e)]

(e) FURNISHINGS OF BOND WHERE TAXABLE YEAR IS CLOSED BY THE SECRETARY OR HIS DELEGATE.—Payment of taxes shall not be enforced by any proceeding under the provisions of this section prior to the expiration of the time otherwise allowed for paying such taxes if the taxpayer furnishes, under regulations prescribed by the Secretary or his delegate, a bond to insure the timely making of returns with respect to, and payment of such taxes or any income or excess profits taxes for prior years.

SEC. 6861. JEOPARDY ASSESSMENTS OF INCOME, ESTATE, AND GIFT TAXES.

[Sec. 6861(a)]

(a) AUTHORITY FOR MAKING.—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

[Sec. 6861(b)]

(b) DEFICIENCY LETTERS—If the jeopardy assessement is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment.

[Sec. 6861(c)]

(c) AMOUNT ASSESSABLE BEFORE DECISION OF TAX COURTS—The jeopardy assessment may be made in respect

of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of section 6212(c) prohibiting the determination of additional deficiencies, and whether or not the taxpayer has theretofore filed a petition with the Tax Court. The Secretary or his delegate may, at any time before the decision of the Tax Court is rendered, abate such assessment, or any unpaid portion thereof, to the extent that he believes the assessment to be excessive in amount. The Secretary or his delegate shall notify the Tax Court of the amount of such assessment, or abatement, if the petition is filed with the Tax Court before the making of assessment or is subsequently filed, and the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

[Sec. 6861(d)]

(d) AMOUNT ASSESSABLE AFTER DECISION OF TAX COURT.—If the jeopardy assessment is made after the decision of the Tax Court is rendered, such assessment may be made only in respect of the deficiency determined by the Tax Court in its decision.

[Sec. 6861(e)]

(e) EXPIRATION OF RIGHT TO ASSESS.—A jeopardy assessment may not be made after the decision of the Tax Court has become final or after after the taxpayer has filed a petition for review of the decision of the Tax Court.

[Sec. 6861(f)]

(f) COLLECTION OF UNPAID AMOUNTS.—When the petition has been filed with the Tax Court and when the amount which should have been assessed has been determined by a decision of the Tax Court which has become final, then

any unpaid portion, the collection of which has been stayed by bond as provided in section 6863(b) shall be collected as part of the tax upon notice and demand from the Secretary or his delegate, and any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 6402, without the filing of claim therefor. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the Secretary or his delegate.

[Sec. 6861(g)]

(g) ABATEMENT IF JEOPARDY DOES NOT EXIST.—The Secretary or his delegate may abate the jeopardy assessment if he finds that jeopardy does not exist. Such abatement may not be made after a decision of the Tax Court in respect of the deficiency has been rendered or, if no petition is filed with the Tax Court, after the expiration of the period for filing such petition. The period of limitation on the making of assessments and levy or a proceeding in court for collection, in respect of any deficiency, shall be determined as if the jeopardy assessment so abated had not been made, except that the running of such period shall in any event be suspended for the period from the date of such jeopardy assessment until the expiration of the 10th day after the day on which such jeopardy assessment is abated.

[Sec. 6861(h)]

(h) CROSS REFERENCES.—

(1) For the effect of the furnishing of security for payment, see section 6863.

(2) For provision permitting immediate levy in case of jeopardy, see section 6331(a).

SEC. 6863. STAY OF COLLECTION OF JEOPARDY ASSESSMENTS.

[Sec. 6863(a)]

(a) BOND TO STAY COLLECTION.—When a jeopardy assessment has been under section 6861 of 6862, the collection of the whole or any amount of such assessment may be stayed by filing with the Secretary or his delegate, within such time as may be fixed by regulations prescribed by the Secretary or his delegate, a bond in an amount equal to the amount as to which the stay is desired, conditioned upon the payment of the amount (together with interest thereon) the collection of which is stayed, at the time at which, but for the making of the jeopardy assessment, such amount would be due. Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid then the bond shall, at the request of the taxpayer, be proportionately reduced. If any portion of the jeopardy assessment is abated, the bond shall, at the request of the taxpayer, be proportionately reduced.

[Sec. 6863(b)]

(b) FURTHER CONDITIONS IN CASE OF INCOME, ESTATE, OR GIFT TAXES.—In the case of taxes subject to the jurisdiction of the Tax Court—

(1) PRIOR TO PETITION TO TAX COURT.—If the bond is given before the taxpayer has filed his petition under section 6213(a), the bond shall contain a further condition that if a petition is not filed within the period provided in such section, then the amount, the collection of which is stayed by the bond, will be paid on notice and demand at any time after the expiration of such period, together with interest thereon from the date of the jeopardy notice and demand to the date of notice and demand under this paragraph.

(2) EFFECT OF TAX COURT DECISION.—The bond shall be conditioned upon the payment of so much of such assessment (collection of which is stayed by the bond) as is not abated by a decision of the Tax Court which has become final. If the Tax Court determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Tax Court is rendered the bond shall, at the request of the taxpayer, be proportionately reduced.

(3) STAY OF SALE OF SEIZED PROPERTY PENDING TAX COURT DECISION.—

(A) GENERAL RULE.—Where, notwithstanding the provisions of section 6213(a), a jeopardy assessment has been made under section 6861 the property seized for the collection of the tax shall not be sold—

(i) if section 6861(b) is applicable, prior to the issuance of the notice of deficiency and the expiration of the time provided in section 6213(a) for filing petition with the Tax Court, and

(ii) if petition is filed with the Tax Court (whether before or after the making of such jeopardy assessment under section 6861), prior to the expiration of the period during which the assessment of the deficiency would be prohibited if section 6861(a) were not applicable.

(B) EXCEPTIONS.—Such property may be sold if—

(i) the taxpayer consents to the sale,

(ii) the Secretary or his delegate determines that the expenses of conservation and maintenance will greatly reduce the net proceeds, or

(iii) the property is of the type described in section 6336.

(C) APPLICABILITY.—Subparagraphs (A) and (B) shall be applicable only with respect to a jeopardy assessment made on or after January 1, 1955, and shall apply with respect to taxes imposed by this title and with respect to taxes imposed by the Internal Revenue Code of 1939.

SEC. 7422. CIVIL ACTIONS FOR REFUND.

[Sec. 7422(a)]

(a) NO SUIT PRIOR TO FILING FOR REFUND.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

Treasury Regulation.

§ 301.6211-1. DEFICIENCY DEFINED.

(a) In the case of the income tax imposed by subtitle A of the Code, the estate tax imposed by chapter 11, subtitle B of the Code, or the gift tax imposed by chapter 12,

subtitle B of the Code, the term "deficiency" means the excess of the tax (income, estate, or gift tax, as the case may be) over the sum of the amount shown as such tax by the taxpayer upon his return and the amounts previously assessed (or collected without assessment) as a deficiency, but such sum shall first be reduced by the amount of rebates made. If no return is made, or if the return (except a return of income tax pursuant to sec. 6014) does not show any tax, for the purpose of the definition "the amount shown as the tax by the taxpayer upon his return" shall be considered as zero. Accordingly, in any such case, if no deficiencies with respect to the tax have been assessed, or collected without assessment, and no rebates with respect to the tax have been made, the deficiency is the amount of the tax imposed by subtitle A, chapter 11, or chapter 12. Additional tax shown on an "amended return", so-called, filed after the due date of the return, is a deficiency within the meaning of the Code.

Internal Revenue Act of 1926.

Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to

the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Sec. 279. (a) If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under subdivision (a) of section 274, then the Commissioner shall mail a notice under such subdivision within 60 days after the making of the assessment.

(c) The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of subdivision (f) of section 274 and whether or not the taxpayer has theretofore filed a petition with the Board of Tax Appeals. The Commissioner shall notify the Board of the amount of such assessment, if the petition is filed with the Board before the making of the assessment or is subsequently filed, and the Board shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

Sec. 312. (a) If a deficiency has been assessed under subdivision (d) of section 308, the executor, within 30 days after notice and demand from the collector for the payment thereof, may file with the collector a claim for the abatement of such deficiency, or any part thereof, or of any interest or additional amounts assessed in connection therewith, or of any part of any such interest or additional amounts. Such claim shall be accompanied by a bond, in such amount, not exceeding double the amount of the claim, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount of the claim as is not abated, together with interest thereon as provided in subdivision (c) of this section. Upon the filing of such claim and bond, the collection of so much of the amount assessed as is covered by such claim and bond shall be stayed pending the final disposition of the claim.

(b) If a claim is filed as provided in subdivision (a) of this section the collector shall transmit the claim immediately to the Commissioner who shall by registered mail notify the executor of his decision on the claim. The executor may within 60 days after such notice is mailed file an appeal with the Board of Tax Appeals. If the claim is denied in whole or in part by the Commissioner (or by the Board in case an appeal has been filed) the amount, the claim for which is denied, shall be collected as part of the tax upon notice and demand from the collector, and the amount, the claim for which is allowed, shall be abated. A proceeding in court may be begun for any part of the amount, claim for which is allowed by the Board. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year

even though the period of limitation prescribed in section 310 has expired.

Sec. 308. (a) If the Commissioner determines that there is a deficiency in respect of the tax imposed by Part I of this title, the executor, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within sixty days after such notice is mailed the executor may file an appeal with the Board of Tax Appeals established by section 900.

(b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceedings shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 310 has expired.

(c) If the executor does not file an appeal with the Board within the time prescribed in subdivision (a) of this section, the deficiency of which the executor has been notified shall be assessed, and shall be paid upon notice and demand from the collector.

(d) If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, such deficiency shall be assessed immediately and notice

and demand shall be made by the collector for the payment thereof. In such case the assessment may be made (1) without giving the notice provided in subdivision (a) of this section, or (2) before the expiration of the 60-day period provided in subdivision (a) of this section even though such notice has been given, or (3) at any time prior to the final decision by the Board upon such deficiency even though the executor has filed an appeal. If the executor does not file a claim in abatement as provided in section 312, the deficiency so assessed (or, if the claim so filed covers only a part of the deficiency, then the amount not covered by the claim) shall be paid upon notice and demand from the collector.

Sec. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within sixty days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

(b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the

Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

(c) If the taxpayer does not file an appeal with the Board within the time prescribed in subdivision (a) of this section, the deficiency of which the taxpayer has been notified shall be assessed, and shall be paid upon notice and demand from the collector.

(d) If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay such deficiency shall be assessed immediately and notice and demand shall be made by the collector for the payment thereof. In such case the assessment may be made (1) without giving the notice provided in subdivision (a) of this section, or (2) before the expiration of the 60-day period provided in subdivision (a) of this section even though such notice has been given, or (3) at any time prior to the final decision by the Board upon such deficiency even though the taxpayer has filed an appeal. If the taxpayer does not file a claim in abatement as provided in section 279 the deficiency so assessed (or, if the claim so filed covers only a part of the deficiency then the amount not covered by the claim) shall be paid upon notice and demand from the collector.

CLAIMS IN ABATEMENT.

Sec. 279. (a) If a deficiency has been assessed under subdivision (d) of section 274, the taxpayer, within 10 days after notice and demand from the collector for the payment thereof, may file with the collector a claim for the abatement of such deficiency, or any part thereof, or of any interest or additional amounts assessed in connection therewith, or of any part of any such interest or additional amounts. Such claim shall be accompanied by a

bond, in such amount, not exceeding double the amount of the claim, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount of the claim as is not abated, together with interest thereon as provided in subdivision (c) of this section. Upon the filing of such claim and bond, the collection of so much of the amount assessed as is covered by such claim and bond shall be stayed pending the final disposition of the claim.

(b) If a claim is filed as provided in subdivision (a) of this section the collector shall transmit the claim immediately to the Commissioner who shall by registered mail notify the taxpayer of his decision on the claim. The taxpayer may within 60 days after such notice is mailed file an appeal with the Board of Tax Appeals. If the claim is denied in whole or in part by the Commissioner (or by the Board in case an appeal has been filed) the amount, the claim for which is denied, shall be collected as part of the tax upon notice and demand from the collector, and the amount, the claim for which is allowed, shall be abated. A proceeding in court may be begun for any part of the amount, claim for which is allowed by the Board. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

(c) If the claim in abatement is denied in whole or in part, there shall be collected, at the same time as the part of the claim denied, and as a part of the tax, interest at the rate of 6 per centum per annum upon the amount of the claim denied, from the date of notice and demand from the collector under subdivision (d) of section 274 to the date of the notice and demand under subdivision (b) of this section. If the amount included in the notice and de-

mand from the collector under subdivision (b) of this section is not paid in full within 10 days after such notice and demand, then there shall be collected, as part of the tax, interest upon the unpaid amount at the rate of 1 per centum a month (or, in the case of estates of incompetent, deceased, or insolvent persons, at the rate of 6 per centum per annum) from the date of such notice and demand until it is paid.

(d) Except as provided in this section, no claim in abatement shall be filed in respect of any assessment made after the enactment of this Act in respect of any income, war-profits, or excess-profits tax.

TITLE IX.—BOARD OF TAX APPEALS

Sec. 900. (a) There is hereby established a board to be known as the Board of Tax Appeals (hereinafter referred to as the "Board"). The Board shall be composed of seven members, except that for a period of two years after the enactment of this Act the Board shall be composed of such number of members, not more than twenty-eight, as the President determines to be necessary.

Internal Revenue Act of 1918.

[This material is from Barton & Browning, *Federal Income and Estate Tax Laws*, 4th ed., John Byrne & Co., Washington, D.C. (1929).]

CLOSING BY COMMISSIONER OF TAXABLE YEAR.

Sec. 250. (g) If the Commissioner finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings

to collect the tax for the taxable year then last past or the taxable year then current unless such proceedings be brought without delay, the Commissioner shall declare the taxable period for such taxpayer terminated at the end of the calendar month then last past and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of said tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any action or suit brought to enforce payment of taxes made due and payable by virtue of the provisions of this subdivision the findings of the Commissioner, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of the taxpayer's design. A taxpayer who is not in default in making any return or paying income, war-profits, or excess-profits tax under any Act of Congress may furnish to the United States, under regulations to be prescribed by the Commissioner with the approval of the Secretary, security approved by the Commissioner that he will duly make the return next thereafter required to be filed and pay the tax next thereafter required to be paid. The Commissioner may approve and accept in like manner security for return and payment of taxes made due and payable by virtue of the provisions of this subdivision, provided the taxpayer has paid in full all other income, war-profits, or excess-profits taxes due from him under any Act of Congress. If security is approved and accepted pursuant to the provisions of this subdivision and such further or other security with respect to the tax or taxes covered thereby is given as the Com-

missioner shall from time to time find necessary and require, payment of such taxes shall not be enforced by any proceedings under the provisions of this subdivision prior to the expiration of the time otherwise allowed for paying such respective taxes.

see

74 - 75